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CHAS. S. STRONG

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

BY RICHARD W. GILL,

CLERK OF THE COURT OF APPEALS.

VOL. III.

CONTAINING CASES IN 1845 & '46.

HERRICK & ALLEN

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NAMES OF THE JUDGES, &c.,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. STEVENSON ARCHER, Chief Judge.
Hon. THOMAS BEALE DORSEY, Judge.
Hon. E. F. CHAMBERS, Judge.
Hon. ARA SPENCE, Judge.
Hon. ALEXANDER C. MAGRUDER, Judge.
Hon. ROBERT N. MARTIN, Judge.

OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles* and *Prince George's* counties.

Hon. ALEXANDER C. MAGRUDER, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. CLEMENT DORSEY, do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne* and *Talbot* counties.

Hon. E. F. CHAMBERS, Chief Judge.
Hon. PHILEMON B. HOPPER, Associate Judge.
Hon. JOHN B. ECCLESTON, do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel, Montgomery* and *Carroll* counties.

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. THOMAS H. WILKINSON, Associate Judge.
Hon. NICHOLAS BREWER, do.

FOURTH JUDICIAL DISTRICT—*Caroline*, *Dorchester*, *Somerset* and *Worcester* counties.

Hon. ARA SPENCE, Chief Judge.
Hon. WILLIAM TINGLE, Associate Judge.
Hon. BRICE J. GOLDSBOROUGH, do.

FIFTH JUDICIAL DISTRICT—*Frederick*, *Washington* and *Allegany* counties.

Hon. ROBERT N. MARTIN, Chief Judge.
Hon. RICHARD H. MARSHALL, Associate Judge.
Hon. THOMAS BUCHANAN, do.

SIXTH JUDICIAL DISTRICT—*Baltimore* and *Harford* counties.

Hon. STEVENSON ARCHER, Chief Judge.
Hon. JOHN PURVIANCE, Associate Judge.
Hon. JOHN C. LE GRAND, Associate Judge.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.
Hon. ALEXANDER NISBET, Associate Judge.
Hon. W. G. D. WORTHINGTON, do.

ATTORNEY GENERAL.

GEORGE R. RICHARDSON, Esquire, (vice JOSIAH BAYLEY, Esquire, resigned,) took the oath of office in this court, on the 25th June 1845.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

JUNE TERM, 1845.

WM. BURTON, EX-PARTE.—G. H. BRICE *vs.* THE STATE.—C. C. JAMESON *vs.* THE STATE.—C. C. JAMESON *vs.* THE STATE.—*June* 1845.

Under the act of 1844, ch. 280, the bonds of trustees, executors, and administrators, conditioned for the faithful performance of their official duties, are not required to be stamped.

Neither is a check of a bank in this State, upon a bank in another State, at sight, or otherwise, nor a certificate of deposite given by a bank.

The terms, "bonds and obligations" in that act, are to be confined to such as are given for the payment of money.

The banks of this State are secured in the privilege of issuing checks, bills of exchange, and certificates of deposite.

The original charters of the "*old banks*," as they are termed, will expire on the 10th March 1846.

Under the act of 1844, ch. 280, a mortgage, without a covenant to pay the debt secured; a lease on which is reserved a rent in money, or in specifics; an assignment of property, in consideration of an annuity, to be paid by the grantee for the life of the grantor; an order or draft not sold, nor intended to be put into circulation, but made solely to obtain possession by the party of his own funds, are not required to be stamped.

A mortgage with a covenant, to pay the debt secured; a due bill, or written acknowledgment of indebtedness to a certain extent; an account stated, signed by the parties, or by the party to be charged, as evidence of debt, are required to be stamped.

APPEALS, &c.

The *first* of these appeals was from the *Orphans* court of *Baltimore* county, and arose upon the application of *William Burton*, for letters of administration on the estate of *Ephraim Sims*. The court had adjudged that the applicant was entitled to letters; he then tendered a bond with securities satisfactory to the court, and offered to take the oaths of office, but as the bond *was not stamped*, according to the act of 1844, ch. 280, the court, on that ground alone, refused to approve of it; *Burton* appealed to this court.

The *second* was a writ of error to *Baltimore* city court, sued out by *G. H. Brice*, against whom proceedings had been instituted for unlawfully signing, sealing, and delivering an unstamped bond in the penalty of $2000, with condition well and faithfully to perform a trust reposed in him for the sale of certain real property by *Baltimore county court*, sitting as a court of equity.

The *third* case arose upon the following unstamped check:

"BANK OF BALTIMORE, *Baltimore, June 2nd*, 1845.

"No. 2755.—Cashier of the *Manhattan Co., N. York*. Pay to the order of *Jas. H. McCulloh*, Pres't, one thousand dollars.

$1000. C. C. JAMESON, Cash'r."

The *fourth* was upon an unstamped certificate of deposite, viz:

"Certificate of Deposit, *Bank of Baltimore*.

$1000. BANK OF BALTIMORE, *June 2nd* 1845.

Dr. J. H. McCulloh has credit at the *Bank of Baltimore*, for one thousand dollars, subject to his order on the return of this certificate, deposited by himself.

No. 705. C. C. JAMESON, Cash'r."

Brice and *Jameson* filed a general demurrer to these proceedings, and the *City court* rendered judgment for the State.

The act of 1844, ch. 280, enacts, "there shall be levied, collected, and paid, the several stamp duties following, viz: for every piece of paper &c., upon which shall be printed or written, any or either of the instruments following, to wit: on any bond, obligation, single bill or promissory note, or notes, made

or executed in this State, above $100, and not made or issued by any incorporated bank; and on any foreign or inland bill of exchange, or other evidence of debt, whether endorsed or otherwise, and whether made or issued by any incorporated institution, individual or firm, according to the following scale," &c.

These causes were argued together, before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER, and MARTIN, J.

By S. J. DONALDSON for the appellees, cited *Hughes vs. King*, 2 *Serg. and Low*, 322. *Jones and Hirst vs. Simpson*, 9 *S. and Low*, 99. 1 *Kent Com.*, 461. *Faw vs. Marsteller*, 2 *Cranch*, 10. *Brig Aurora vs. The U. States*, 7 *Cranch*, 382. 2 *Step. N. P.*, 1241. *Annandale vs. Pattison*, 9 *B. and Cres.*, 919. *Bowen vs. Ashley*, 4 *Boss. and Pull*, 274, 278, 279.

RICHARDSON, Att'y General, 1 *Starkie Rep*, 322. *Davis vs. Ostrander*, 1 *John. Cases*, 106. *Somerset vs. Dighton*, 12 *Mass.* 384. *Head vs. Providence Insu. Co.*, 2 *Cranch*, 127. 7 *Mass.*, 524. *Pearce vs. Atwood*, 13 *Mass.*, 343. *Byrne vs. Crowninshield*, 1 *Pick.*, 261. 1 *Whart. Dig.*, 708. *Co. Lit.*, 172, *a. Bartlett, et al. vs. Kings Exrs.*, 12 *Mass.*, 545. *Ellis vs. Paige, et al.*, 1 *Pick*, 45. 3 *A. and Ames on Corp.*, 3. *Providence Bank vs. Pittman*, 4 *Peter*, 514.

R. JOHNSON, in reply, cited *Preston vs. Browder*, 1 *Wheat.*, 115. *Calder and Wife vs. Bull and Wife*, 3 *Dallas*, 386.

MAGRUDER, J., delivered his opinion as follows:

These several cases, although they present different questions, have been argued together, and will be disposed of at the same time. All of them arise under the act of Assembly of 1844, chap. 280.

With respect to one of the appeals by *G. H. Brice*, the court below erred, in deciding that the bond tendered required a stamp. It is a bond with a collateral condition, and no bonds of that description are required by the act of Assembly to be stamped. It is true that such bonds, like others, are obligations, but they do not oblige the obligors to pay any sum

of money. They are taken to secure the performance of some duty, not the payment of money. It is impossible therefore to tell, upon which of the stamps mentioned in the law, official or other bonds, for the performance of any duty, are to be written, or to say that they are obligated to pay above one hundred dollars. It is true that there is a sum of money mentioned in these bonds, but this is mentioned as the penalty; and the penalty, at the time of the execution of the bond, is not a debt. If it was, then, a bond given for the payment of money due, would require a larger stamp than a single, or even penal bill, for the same debt. If the bond had been received, and either of the obligors had died, it would have been no voucher or proof of a claim against his estate. If a suit was instituted upon such a bond, in order to sustain the action, other proof than that of the execution and delivery of the bond would be necessary. In addition to this it would have been necessary to prove a breach of the condition of the bond, which, of course, must have been committed subsequently to its execution, and then, not the penalty, but damages for the alleged breach of the condition, (to be ascertained by a jury,) would be recovered.

A recognizance taken in or out of court, for the appearance of a person, is an obligation, just as much as the bond in this case; yet surely it will not be said, that a recognizance must be written on a stamp.

Formerly, indeed, on the forfeiture of a bond the whole penalty was recoverable, but not until there had been a breach of the condition. Upon a bond conditioned for the payment of rent, the penal sum could not be recovered, or claimed, until the rent was due; and upon a bond given by an administrator, no suit can be brought until the administrator has done, or omitted to do some act, which is a breach of the condition.

A mortgage mentions a sum of money to be due by the mortgagor to the mortgagee, but still it is not an obligation to pay the money, but merely a conveyance of property to secure its payment. "No action of covenant will lie on the proviso or condition in the mortgage; and the remedy of the mortgagee for non-payment of the money, according to the proviso,

would seem to be confined to the land where the mortgage is without any express covenant or separate instrument." 4 *Kent*, 139. But if the mortgage contains a covenant to pay the debt, then it must be on a stamp; not because it is a mortgage, but because besides a mortgage, it is an obligation to pay a certain sum of money.

If there be an express covenant to pay the debt, a stamp is requisite, although the mortgage has a bond or note for the payment of the same, and on stamped paper. This is because the law requires that every obligation, (if the sum exceeds one hundred dollars,) shall be written upon a stamp; and does not make in favor of a creditor, who is about to take a covenant in addition to a bond, the same exception which is made in the case of more than one bill of exchange. These remarks are designed to show, what obligations must be written upon stamped paper; and that no obligation like the one in this record, need to be stamped. The same is to be said of the trustee's bond.

In one other of the cases, it was claimed in behalf of the State, that foreign bills of exchange, though issued by a bank of *Baltimore*, must be upon stamped paper. This claim is resisted, not upon the ground that the act of the last session does not require such bills of exchange to be written upon a stamp, (it must be admitted that it does,) but, because the legislature had not the power to enact such a law. It is insisted, that the legisture has parted with the power thus to tax (as it is called,) the banks of *Baltimore:* and if not all of them, certain banks of that city, of which the bank that issued the bill of exchange, in the record, is one.

We are then to decide a grave and solemn question indeed. We are asked to say, that while the power of our legislature to require of its citizens to use a stamp, when executing instruments of this description, cannot be controverted, there are, among us, banking institutions deriving from the legislature their very existence, and all their powers, which may disregard and disobey the law; although it requires of them nothing more than it requires of every one of its citizens.

It need not be remarked, that when the judicial department of the government is required to pronounce an act of the legislature to be unconstitutional, it must not be because the judges have doubts, even serious doubts, about the constitutionality of the act; even doubts, which would have constrained them, if they had been members of the legislature, to vote against the bill. "To authorize this court, (said *Judge Patterson*, 4 *Dal.* 161,) to pronounce any law to be void, it must be a clear unequivocal breach of the constitution: not a doubtful and argumentative implication."—" I will never decide any law to be void, but in a clear case," was the language of *Mr. Justice Chase*, 3*rd Dallas*, 386. This is, in truth, more than merely a question, whether an act of the legislature is constitutional. It forces upon us the question, whether past legislation has not taken from those who succeed to its powers and duties, the power for providing for the wants of the State, by just, because equal taxation? It is alleged that this has been done, and that the proof of it is to be found in various acts of the General Assembly in 1821, and 1834, and 1835; and even anterior to all the laws of those sessions, to which reference has been given to us.

In the first place, we are told, that they all possess it, because in granting to them their charters, and the privileges thereby conferred on them, the legislature secured to them the privilege not claimed by them.

Of those who undertake to maintain the affirmative of this proposition, it might be required, carefully to examine the various charters, and to be sure that the power which is claimed for all, has been *expressly* granted to all. For, surely, it will not be pretended, that the mere act of incorporating a company, with an avowal in the act of incorporation, that the company is incorporated for banking purposes and with banking privileges, would confer upon them the right, or rather the exemption, which they now claim. But according to the view which I have taken of this subject, it is not necessary for me to examine all these charters, and to ascertain what privileges given to one, has not been conferred upon others. Let it be assumed, that the legislature in bestowing "*individuality*"

on these associations, have granted to them all, a right to deal in every article, and to employ their funds in every way, in which any citizen may, still the question remains, how do they in virtue of their charters acquire a right, not only to deal in bills of exchange, (this many, if not all of them, possess, as every citizen of the State possesses it,) but to be exempted from all obligation to use stamps, as required by the act of Assembly, when they make a foreign bill of exchange? The law, it is said, imposes "a tax or burthen" upon them, or rather, on one of their privileges. This will admit of doubt: but granting it to be true, it proves nothing in favor of these institutions, unless there can be found in their charters an exemption from the use of the stamps, whenever others are commanded to use them. The question, let it be kept in remembrance, is not whether the State has granted the privilege without limitation, to deal in bills of exchange, but whether the State has surrendered to them a particular portion of the taxing power?

In the case of the *Providence Bank against Billings and Pittman*, 4 *Peters*, 561, *Chief Justice Marshall* in delivering the opinion of the court, said: "that the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; *that a consideration sufficiently valuable to induce a partial release of it*, may not exist; but as the whole community is interested in retaining it *undiminished*, that community has a right to insist that its abandonment ought not to be presumed, *in a case in which the deliberate purpose of the State to abandon it, does not appear.* * * * * A company may be incorporated for the purpose of trading in goods as well as in money. If the policy of a State should lead to the imposition of a tax on incorporated companies, could those which might be incorporated, claim an exemption *in virtue of a charter which does not indicate such an intention.* The time may come, when a duty may be imposed on manufactures; would an incorpo-

rated company be excepted from this duty, *as the mere consequence of its charter*?"

Again, page 563: "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the government *as a part of itself*, and *need not be reserved* when property of any description, *or the right to use it in any manner is granted to individuals or corporations*. However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burthens, and that portion must be determined by the legislature."

In the same case, much may be found, which conclusively demonstrates, that incorporated banks, no matter what property they may be authorized to hold; no matter with what powers they may be cloathed, unless their charters shall *express* the exception, are no more exempted from taxation, than an unincorporated company, and, of course, individuals are, when carrying on the same business. "A mere private corporation engaged in its own business, would certainly be subject to the taxing power of the State, as any individual would be."

Much of false conclusion upon subjects of this kind seems to have been produced, by applying the reasoning of the court, in the case of *McCulloh against the State of Maryland*, to private banks, created by the State, and taxed by the State which created them. The rights of these institutions, are not more sacred and inviolable than those of individuals. All that banks, when a charter has been granted to them, can claim, (and to this they have an unquestionable claim,) is, that they shall not be compelled to bear more than their just proportions of the burthens, which the wants of the State ought to impose upon all within its territorial jurisdiction; that *exemptions* granted to them, in express terms, be regarded, as are similar grants to individuals. For what, after all, is a bank charter? Some seem to regard it, as a grant of nothing but franchises of royal prerogatives. Not so was it understood by the learned judge, from whose opinion I have already borrowed so freely.

individuality, on a collective and changing body of men. This capacity is always given to such a body. Any privileges, which may exempt it from the burthens, common to individuals, do not flow necessarily from the charter, *but must be expressed in it, or they do not exist.*" In this case an attempt was made by a bank, to get rid of a tax which was imposed subsequently to the grant of its charter. Of a similar attempt made in *Massachusetts*, we have a report in 12 *Mass. Reports*, 252; and in which the *Chief Justice Parker* explains very fully, the rights and privileges of incorporated banks. "The effect of this charter was to give, to the individuals who applied for it and their successors, the right to act as a body corporate and politic, in the management of their common funds, under the restrictions and regulations provided in the charter."

They are as one individual in the management of the capital, in the way and according to the purposes for which they are incorporated. They procure by their charter the privilege, in all contracts and suits, of using one short name, in place of all the names of the stockholders. In *Maryland*, and most of the States, of participating in the profits, without being subject to all the liabilities of a partnership, for banking purposes; of exempting their own portion of the capital from the payment of debts incurred, while it was invested, by a sale of their stock. One effect of the charter, and of the public confidence which it acquires by reason of its incorporation, is, that they can issue notes, and by means of these, trade with a larger capital than they have invested. These are privileges of considerable value to those who have money to lend, and because of these advantages, prefer an investment in bank stock to the trouble and hazard of lending it themselves. For these privileges, what is called *a bonus*, is often paid, but the payment of a *bonus*, gives them no privileges, or exemptions, which are not expressed in the charter. We are authorized, by a decision of the Supreme Court, (*The Bank of Columbia against Okely*, 4 *Wheat.*, 234,) to say, that the act of incorporation, may provide for the corporation valuable remedies, which may be taken away. See also 4*th Cranch* 384.

The cases above cited, and indeed, the definitions given above of bank charters, prove, that no matter how extensive their powers, in what articles they are permitted to deal; if all others dealing in the same articles, are required to use a stamp, the banks also may be required, unless the State has, in express terms, exempted them from the obligation to use them.

If the banks, for any reason which has yet been assigned, could claim this exemption, they might, with equal reason insist, that the "power to sue," given by charter, will exempt them from all obligation to pay the tax upon writs, which all who sue in our courts, are required to pay.

The claim of these banks, to draw foreign bills of exchange, without using a stamp, is not "clear and unequivocal;" it cannot be made out without, (nor indeed by,) "a doubtful and argumentative implication." Those who maintain it, are obliged to rely on the old argument, (when introduced here, entirely out of place,) "a power to tax, is a power to tax *ad libitum; that is*, a power to prohibit; *that is*, a power to destroy;" and *ex consequenti*, if this law, so far as it relates to banks be constitutional, "the franchise, or banking privilege" granted, may be taken away indirectly; that is, by imposing upon it taxes, which would render the privilege of no value: "The taxes may absorb the profits." *Chief Justice Marshall's* answer to this is, "then the grant of any other thing implies the same exemption, for that thing may be taxed to an extent, which will render it wholly unproductive to the grantee. Land, for example, has in many, perhaps in all the States, been granted by government, since the adoption of the constitution. This grant is a contract, the object of which is, that the profits issuing from it, may enure to the benefit of the grantee. Yet the power of taxation may be carried so far, as to absorb those profits. Does this impair the obligation of the contract? The idea is rejected by all," 4 *Peters*, 562. Yet the belief is entertained, that it must be maintained in the case of a land, (or other,) tax, before the stamp act of the last session can be proved to be a violation of any contract, to be found in the charters of these banks.

Surely the words "franchise or banking privileges," wherever found, cannot be construed to exempt them from the use of stamps in any of their dealings. The correct meaning of the word "franchise" when used in our bank charters, it is not very easy to ascertain. Some writers are very fond of telling us, that "it is a royal prerogative in the hands of a subject." "In *England* it is some privilege in the hands of a subject, which the king alone can grant; in this country it is supposed to be a privilege or immunity of a public nature, which cannot legally be exercised, without a legislative grant." In 13 *Peters*, 595, *Chief Justice Taney* gives a definition of franchises, of which I entirely approve. "Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally of common right. It is essential to the character of a franchise, that it should be a grant from the sovereign authority; and in this country no franchise can be held, which is not derived from a law of the State." It would be difficult to ascertain, what franchise, according to this definition, the bank has, or how it is to be made out, that its "banking privilege" can authorize a claim by the banks to dispense with stamps, when they, in common with others, are required to use them.

I cannot discover the slightest foundation for this claim in the law of 1821, nor yet in those of 1834 or 1835. I consider the act of the last session, in all its provisions, to be constitutional.

Whether checks or orders require a stamp, must depend upon the *quo animo*. If the payee named in them be the mere agent of the maker, to receive and convey to him the money, there is nothing in the law which would authorize us to say, that it needs to be stamped. It is a mere power of attorney, to be returned if the money be not collected; and gives to the party no right to demand it in his own name. Accordingly a bank needs not require a stamp on orders which it receives for collection. But if a bill, when received by a bank, is one of those which ought to be placed among "bills purchased," then a stamp, in my opinion, is necessary.

The certificate of deposite is, in effect, a promissory note, and not what is called a bank note. It is evidence of a debt, or indebtedness, to the amount expressed in it. It will answer all the purposes of a promissory note, and would probably supersede promissory notes, (in the usual form of them,) if while the latter require a stamp, the former did not.

CHAMBERS, J., stated the conclusions of the court, as follows:

The questions brought before us by the different records, are, in relation to—

1st. A trustee's bond.

2nd. Bonds by executors or administrators.

3rd. A check of a bank in this State, upon a bank in another State; payable at sight, or otherwise.

4th. A certificate of deposit given by a bank.

We are of opinion, that a stamp is not required for either of these instruments, under the act of 1844, chap. 280.

That "bonds and obligations" are to be confined to such, as are given for the payment of money; and not for the performance of some official, or other act or duty.

That the banks are secured in the privilege of issuing checks, whether at sight or otherwise; bills of exchange, whether foreign or domestic; and certificates of deposit: and that this privilege does not exist, only, in virtue of the act of 1821, chap. 131, sect. 11; and is not, therefore, either confined to the "old banks," as they are termed, nor limited, as to its duration, to the 10th March 1846; when, in our opinion, the old charters will expire.

The attorney general, and the adverse counsel, having earnestly requested an expression of the views of the court, upon the various other points filed in these causes, and fully and ably argued, we feel justified, in the peculiar condition of the case, and in the known anxiety of the business portion of the community to be advised on these questions, in expressing the conclusions to which the argument, and a consideration of the authorities, have conducted us.

We think the law does not require a stamp for any of the following instruments:

A mortgage without a covenant to pay.

A lease, on which is reserved a rent in money or in specifics.

An assignment of property in consideration of an annuity, to be paid by the grantee, for the life of the grantor.

An order or draft not sold, nor intended to be put into circuculation, but made solely to obtain possession, by the party, of his own funds.

We think a stamp necessary to the instruments following:

A mortgage with a covenant to pay; and whether such mortgage be the only security taken, or whether there be, also, a note or bond, also stamped, and for the same debt: the note or bond being, of course, to be stamped.

A due bill, or written acknowledgment of indebtedness to a certain extent.

An account stated, signed by the parties or by the party to be charged, as evidence of debt.

The judgment of the court below is reversed in each case, and judgment entered for appellants, respectively, with costs.

Dorsey and Martin, J., dissented from the conclusion, that a mortgage without a covenant to pay the debt, was not subject to a stamp.

Chambers, J., dissented from the conclusion, that a due bill and an account stated should be stamped.

JUDGMENTS REVERSED, AND
JUDGMENTS FOR APPELLANTS.

John B. Howell *vs.* The State of Maryland.—*June Term* 1845.

By the act of the extra session of 1841, ch. 23, the interest or proportion in all ships or other vessels, whether in port or out of port, owned by persons resident of the State, are directed to be valued, as other property is directed, and charged according to such valuation with the public assessment of twenty cents in every hundred dollars of assessed value. Held: that the tax was a constitutional and valid exercise of power by the State.

The objects intended to be secured by the act of Congress of 18th February 1793, for enrolling and licensing ships and vessels were, by excluding foreign vessels from a participation in the commerce which existed between the States, to cherish and promote the growth of our own marine, and guard, as far as possible, the revenue from the frauds and abuses to which it would be otherwise exposed.

The power of Congress to regulate the coasting trade, is plainly deducible from that clause of the constitution, which has granted to the national government the power to regulate commerce among the several States.

The term, commerce, includes navigation.

The *American* ownership of a vessel and her national character is ascertained, not by her license, but by her enrolment. It shows that the regular proof of ownership and character has been given.

The license authorises the owner of the vessel to carry on the coasting trade, and navigate the waters of the *United States*.

The right to tax is an incident of sovereignty, and is co-extensive with that t which it is incident. All subjects over which the sovereign power of the State extends, are objects of taxation, but those over which it does not extend, are upon the soundest principles exempt from taxation.

The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but it does not extend to those means which are employed by Congress, to carry into execution powers conferred on that body by the people of the *United States*.

The decisions of the Supreme Court of the *United States* on constitutional questions are conclusive.

Property in ships and vessels was, before the adoption of the constitution of *the United States*, embraced by the taxing power of the State.

The power of taxation extends to all the people of the government, and embraces every thing which may be fairly considered as constituting a part of the mass of property within the State.

The interest in ships and vessels is private property; and belonging to a citizen of *Maryland*, living within her territory, subject to her jurisdiction, protected by her laws, is a part of his capital in trade; and like other property the subject of State taxation.

The States still hold all the powers which they originally possessed, except such as have been delegated to the *United States*, or prohibited to the States.

The general government has created a large class of subjects, without the reach of the taxing power of the States. The fiscal agents of the government; the army and navy; the judicature of the *United States;* the public ships; the national institutions and property are exempt from State taxation.

A restriction of a power created by implication, supposes that but for the implied limitation the power would have existed, and might have been exercised.

The institutions of the *United States*, though within the territory, are constructively without the local jurisdiction of the States in every respect and for every purpose including that of taxation.

Where there is a conflict between rights under the law of the local government and a law of Congress, the State law must yield to that which is supreme and paramount.

There is no incompatibility between the law taxing the interest in a vessel, and the license authorising it to carry on the coasting trade. The tax does not interfere with the right to navigate.

To render a State law unconstitutional, or extinguish a State power by implication, on the ground that it is repugnant to powers vested in the general government, the repugnancy must be clear, immediate, and direct; and not merely speculative, indirect, and contingent.

Appeal from *Baltimore* county court.

This was an action of *assumpsit*, docketted by consent to September term 1844, between the State as plaintiff, and the appellant as defendant, who pleaded non-assumpsit.

It was agreed, that the taxes charged in the following bills were regularly assessed upon the property of the defendant under the acts of the General Assembly of *Maryland*, so far forth as the formal valuation of the property, the imposition of the tax, and the presentation of the bills are concerned; and that the amounts, as charged, are the correct amounts for the respective years under the law, upon the property held by defendant in vessels. It is agreed, that the property so taxed, consists in vessels which navigate the seas, and are regularly registered and licensed as *American* vessels under the laws of Congress. It is agreed, that if the State of *Maryland* has a right to tax such property, that judgment shall be entered for the plaintiff. If not, that judgment shall be for defendant. All errors in the pleading waived.

The tax bills referred to above are in the form following, viz:

"3-131. State Taxes, 1841, *Jno. B. Seidenstricker, Coll'r.*, *John B. Howell*,

To the State of Maryland, Dr.

To 87. Int. in vessels, $56,000, State Tax, a 20 cents per $100, - - - - $112 00

3-134. State Taxes, 1842.

Int. in vessels, $56,000, State Tax, 25½ cents pr. $100, - - - - $142 80

Same for 1843, - - - 142 80"

It is also agreed, that *Baltimore* county court shall enter judgment *pro forma* in this case, for the State, reserving to the defendant the right to appeal.

The judgment was entered accordingly, and the defendant prosecuted this appeal.

It was agreed, in the appellate court, that the record should be so amended as to show, that *John B. Howell* is a resident of the city of *Baltimore*, and a citizen of the State of *Maryland*, and that his interest in vessels taxed, arises upon vessels belonging to the city of *Baltimore*, and there trading.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER, and MARTIN, Judges.

By REVERDY JOHNSON for the appellant, and
By MARSHALL and RICHARDSON, Att'y Gen'l, for the State.

MARTIN, J., delivered the opinion of this court.

The legislature of *Maryland*, on the 1st of April 1841, passed an act, entitled: "An act for the general valuation and assessment of property in the State, and to provide a tax to pay the debts of the State." By the first section, it is provided, that all real and personal property in the State; all chattels, real and personal; all goods, wares and merchandizes, and other stock in trade, at home, or not permanently located elsewhere; *the interest or proportion in all ships or other vessels, whether in port or out of port, owned by persons resident of the State;* and various other descriptions of property, to which it is not necessary for the purposes of this case to refer, should

be valued agreeably to the directions of the act, and charged according to such valuation, with the public assessment. The assessment imposed, is twenty cents in every hundred dollars worth of assessable property, according to its assessable valuation.

In conformity with the provisions of this act, an assessment was imposed on the appellant on account of his interest or proportion in certain vessels, amounting, in the year 1841, to the sum of $112, in the year 1842, to the sum of $142.80, and to the same sum in the year 1843.

The appellant having resisted the payment of this tax, an action to recover its amount was instituted against him by the State of *Maryland*, in *Baltimore* county court, and at the trial of the cause, the following statement of facts was agreed upon:

"That the taxes charged in the annexed bills were regularly assessed upon the property of the defendant, under the act of the General Assembly of *Maryland*, so far forth as the formal valuation of property, the imposition of the tax, and the presentation of the bills are concerned; and that the amounts so charged are the correct amounts for the respective years, under the law, upon the property held by the defendant in vessels. It was agreed, that the property so taxed, consisted in vessels which navigate the seas, and are regularly registered and licensed as *American* vessels, under the laws of Congress." After the case reached the Court of Appeals, the record was amended for the purpose of introducing the further admission; "that the appellant is a resident of the city of *Baltimore* and State of *Maryland*, and that his interest in the vessels taxed, arises upon vessels belonging to the city of *Baltimore*, and there trading."

The appellant has denied his liability to pay the tax imposed upon him under this act of Assembly, on the ground, that so much of that statute as professes to tax his interest in vessels duly licensed in conformity with the act of Congress of the 18th of February 1793, is incompatible with the privileges and immunities conferred by the license, and repugnant to the constitution and laws of the *United States*.

The act of Congress, under which the appellant claims exemption from the operation of the *Maryland* law, is that for

enrolling and licensing coasting vessels. It enacts, that no ships or vessels, except such as shall be enrolled and licensed, shall be deemed ships or vessels of the *United States*, entitled to the privilege of ships or vessels employed in the coasting trade. It also declares, that every ship or vessel engaged in the coasting trade, and not being so enrolled and licensed, shall pay the same fees and tonnage in every port of the *United States* at which she may arrive, as ships or vessels not belonging to a citizen of the *United States*; and if she has on board any articles of foreign growth or manufacture, or distilled spirits, other than sea stores, the ship or vessel shall be forfeited.

The objects intended to be accomplished by this act, were, by excluding foreign vessels from a a participation in the commerce which existed between the States, to cherish and promote the growth of our own marine, and guard, as far as possible, the revenue from the frauds and abuses to which it would otherwise be exposed. It is therefore clear, that though the power to regulate the coasting trade, by an act like that now under consideration, has not been expressly delegated to Congress, yet their right to legislate on this subject is plainly deducible from that clause in the constitution, which has granted to the national government the power to regulate commerce with foreign nations, and among the several States.

In the case of *Gibbons against Ogden*, 9 *Wheaton*, the Supreme Court determined, that the power to regulate commerce with foreign nations, and among the several States, extended to the regulation of navigation. They say, "if commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no laws prescribing what shall constitute *American* vessels, or requiring that they shall be navigated by *American* seamen. Yet this power has been exercised from the commencement of the government, and has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All *America* understands, and has uniformly understood, the word commerce to comprehend navigation. It was so understood when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for

which the people of *America* adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense, and the attempt to restrain it comes too late. The word used in the constitution, they affirm, comprehends, and has always been understood to comprehend navigation within its meaning; and a power to regulate navigation, is as expressly granted as if it had been added to the word commerce." The validity of this act of Congress, as an auxiliary power, "necessary and proper" to carry into execution the expressly delegated power of regulating commerce with foreign nations, and among the several States, is therefore placed beyond controversy by the Supreme Court, and is not again to be questioned.

Assuming however, as too clear for dispute, that this act of Congress was a constitutional exercise of power; the counsel for the State of *Maryland* have contended, that there is no color for the argument that seeks to exempt the owner of these vessels from the contributions to which he is liable, in common with the other citizens of the State, on the ground that the vessels were furnished with a coasting license by the collector of the port to which they belonged, because the only effect and object of this custom house document was to ascertain the ownership and character of the vessel to which it may have been granted, and that it gave no right to trade.

We are very clearly of opinion, that the counsel are mistaken in the view thus presented by them of the object and nature of the license. The *American* ownership of the vessel and her national character, is ascertained not by the license, but by the *enrolment*. It is the enrolment which shows that the regular proof of ownership and character has been given. This being accomplished, the owner becomes entitled to receive, and does receive from the collector of the port a *license*, the import and effect of which is, to authorise him to carry on the coasting trade, and navigate the waters of the *United States*.

In the case of *Gibbons and Ogden*, 9 *Wheat*. 1, the Supreme Court, after a particular examination of the various provisions of the act of Congress, regulating the coasting trade, and the

terms of the license, in answer to the argument presented for the plaintiff in error, that the sole purpose of the license was to confer the *American* character, say: "Notwithstanding the decided language of the license, it has been maintained, that it gives no right to trade, and that its sole purpose is to confer the *American* character. The answer given to this argument, that the *American* character is conferred by the enrolment, and not by the license, is, we think, founded too clearly into the words of the law, to require the support of any additional observations. The enrolment of vessels designed for the coasting trade, corresponds precisely with the registration of vessels designed for the foreign trade, and requires every circumstance that can constitute the *American* character. The license can be granted only to vessels already enrolled, if they be of the burden of twenty tons or upwards, and requires no circumstance essential to the *American* character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do, that is, to give permission to a vessel already proved by her enrolment to be *American*, to carry on the coasting trade."

Conceding then, the truth of the propositions advanced by the counsel for the appellant: that the act of Congress, regulating the coasting trade, and providing for the registration, enrolment and licensing of vessels, is a constitutional exercise of the power conferred upon Congress to regulate commerce with foreign nations, and among the several States; that the license granted by the collector of the port to carry on the coasting trade in conformity with those acts, was not given for the purpose of conferring the *American* character, but was a legislative grant of the right of transit, and to trade upon and navigate the waters of the *United States;* and that any law of the State of *Maryland*, though passed in the execution of some one of its acknowledged powers, must yield when found in collision with a law of Congress, and the right conferred by that law, in the sense in which that term is to be understood in cases where there is an asserted conflict of powers, between the national and State Governments; we approach the interesting and important enquiry, whether the fact that these vessels were

licensed by the collector of the port of *Baltimore*, as prescribed by the act of Congress, exempts the owner of that property from the taxing power of the State, when fairly exerted for the purposes of revenue?

The taxing power of the State, as modified, and restrained by the constitution of the *United States*, was delineated with characteristic perspicuity and power by the late Chief Justice of the Supreme Court, in the case of *McCulloh against the State of Maryland*, decided at the February term, 1819, 4 *Wheat.*, 316. At page 428 of the opinion, he says: "Before we proceed to examine the argument advanced by the counsel for the State of *Maryland*, and subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted, that the power of taxing the people and their property, is essential to the very existence of the government, and may be legitimately exercised on objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of the State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of their constituents over their representatives to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of the State to tax them, sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are given by all, for the benefit of all, and upon theory, should be subjected to that government only, which belongs to all."

The court say, "that it may be objected to the definition thus given, that the power of taxation is not confined to the people and property of the State. That it may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation, but those over which it does not extend, are upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the *United States*? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the *United States*, to a government, whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently the people of a single State cannot confer a sovereignty which will extend over them. If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of the State unimpaired; which leaves to a State the command of its resources, and which places beyond its reach, all those powers which are conferred by the people of the *United States* on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved as we ought to be, from clashing sovereignty, from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. We are not

driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. We find then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise." Again, the learned court, at page 436, in explanation of the grounds on which the unconstitutionality of the law imposing a tax on the *Bank of the United States*, is placed; declare, "that the opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with other real property within the State, nor to a tax imposed on the interest which the citizens of *Maryland* may hold in this institution, in common with the other property of the same description throughout the State. But this is a tax on the operations of the bank, and is consequently a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution."

This is the reasoning, and such are doctrines of a court, whose decisions on questions of constitutional law, are to be received as conclusive, and we think, they clearly establish the validity of the *Maryland* statute.

It must be admitted, that property like that, which is now the subject of examination, was originally, and before the adoption of the *United States*, embraced by the taxing power of the State. All subjects were legitimate objects of taxation, over which the sovereign power of the State extended, because this power is an incident of sovereignty, and is co-extensive with that to which it is an incident. The power of taxation extends to all the people of the government, and embraces every thing which may be fairly considered as constituting a part of the mass of property within the State. This is a cardinal principle, on the preservation and application of which, the existence

of the State governments depends. In the case of the *Providence Bank*, 4 *Pet.*, 563, *Chief Justice Marshall* says: "that the power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. That it is an original principle which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in the government as a part of itself."

The interest upon which the tax in this case was imposed, was the private property of a citizen of *Maryland*, living within her territory, subject to her jurisdiction, protected by her laws, and bound in common with other citizens, to contribute to her support. The vessels upon which the tax was laid, constituted a part of his capital employed in trade, like that of the merchant, manufacturer, or artizan. For the property itself, the State had provided by her laws, ample security and protection. It was taxed rateably, with other property produced within the State. The law in question, was passed by the legislature of *Maryland*, in good faith, to raise revenue for the high purpose of paying the debts of the State, from what was believed to be legitimate sources, and not to interfere with the regulations of commerce, or with any other power possessed by the general government. Is there then, any rule of law, or principle of construction, by which the State is to be held, as having surrendered her right to tax this property, as a portion of the private estate of one of her citizens, residing within the limits of her sovereignty and jurisdiction? We think there is not.

It is not necessary at this day to enter into an examination of the constitution, for the purpose of ascertaining the class of powers surrendered to the general government, and those retained by the States. It is established, that the States still hold all the powers which they originally possessed, except such as have been delegated to the *United States*, or prohibited to the States. This is the language of the tenth article of the amendments to the constitution. And it clearly appears from the papers of the *Federalist*, that the distinguished men, who participated so largely in the formation and adoption of the constitution, regarded this as its true interpretation, in the absence of the amendment referred to. The author of the thirty-second

number of that work, when discussing the proposed plan of the constitution, says: "As the plan of the constitution aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act, exclusively delegated to the *United States*. This exclusive delegation, or rather alienation of State sovereignty, would only exist in three cases: where the constitution in express terms, granted an exclusive authority to the Union; where it granted in one instance, an authority to the Union, and in another, prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States, would be absolutely and totally contradictory and repugnant." It is clear then, that unless the right of the State to tax property, like that which is now the subject of examination, has been alienated or surrendered, the power to do so, remains, and may be exercised.

Let the question before us be tried by this rule.

We are now considering the taxing power of the State. The only express prohibition to be found in the constitution of the *United States* on this power, is that contained in the tenth section of the first article, by which the States are prohibited, unless with the consent of Congress, from laying any imposts or duties on imports or exports; and are also, without such consent, prohibited from imposing any duty on tonnage. This is the only limitation upon the taxing power of the States, to be found in the constitution of the *United States*, and it has been asserted by very distinguished authority, and we think correctly, that this revenue power, as it originally existed, is subject to no other restraint. The authors of the *Federalist*, when examining the subject of the taxing power, in the thirty-third number, say: "The inference from the whole is, that the individual States would, under the proposed constitution, retain an independent and uncontrollable authority, to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports." By every kind of taxation, they mean, the right to tax all persons and property within the jurisdiction of the State, and as such, subject

to the taxing power, with the single exception of duties on imports and exports. The view thus presented, is strongly supported by the opinion of the Supreme Court, in the case of *McCulloh against the State of Maryland*, already referred to. It must be recollected, that in this case, the whole ground of the taxing power of the States, as modified, limited, or restrained by the constitution of the *United States*, was examined with almost unprecedented ability. It was directly affirmed by the counsel for the bank, that there were not only express, but implied limitations on the taxing power of the States. The incompetency of the State to tax the bank was rested, in part, on the principle, that this State power was confined and restrained by implied limitations, although an examination of the case will show, that the cause of the bank was placed on higher and firmer grounds. Upon this subject the Chief Justice, speaking for the court, says: "This opinion does not deprive the States of any of the resources which they originally possessed." Does not the learned Chief Justice intend to affirm the proposition stated by the *Federalist*, that the States retained authority to raise revenue by every kind of taxation, which they *originally* possessed, except duties on imports and exports?

It may be admitted, that after the States had surrendered to the general government the whole commercial power of the country, a restriction on their original right to impose duties on imports, would, if not expressly provided for, have been implied; because, as the imposition of duties on imports, is an instrument by which Congress may most effectually regulate commerce with foreign nations, the reservation of this authority by the States, would have been absolutely and directly incompatible with the commercial power granted to the national government. But this restriction was not left to implication. It was expressly inserted in the text of the constitution, and it may well be contended, that the prohibition on the taxing power of the States, was inserted *ex industria*, that this essential and vital power, about which the States manifested at all times so much solicitude, might be forever protected against implied and constructive limitations. When the States surrendered to the general government this rich source of revenue, it was not supposed

that their capacity to raise supplies, would be further abridged by implied limitations on the taxing power. Such a belief, if generally entertained, would perhaps have proved fatal to the constitution.

We are aware that there has been created by the general government, a large class of subjects, without the reach of the taxing power of the States. The fiscal agents of the government, the army and navy, the judicature of the United States, the public ships, the national institutions and property, are exempt from State taxation. Why? Not upon the ground, that the States were restrained by implication, from taxing the national institutions and property. A restriction created by implication, supposes, that but for the implied limitation, the power would have existed, and might have been exercised. But, because those subjects, in the nature of things, never could have become objects for the taxing power of the States. They constituted no part of the resources of which the States were originally possessed. Having been created by the national government, they could not have been liable to taxation by the States.

It is also a very clear proposition, that the institutions of the *United States*, though within the territory, are constructively without the local jurisdiction of the States, in every respect, and for every purpose, including that of taxation. It is upon this ground, that the institutions of the *United States*, the judicature, the custom house, the public ships, are safely placed beyond the reach of the taxing power of the States, and not because of any implied restriction on that power. In the same class, may be placed imported goods in the public warehouses, on which the duties have not been paid. Property of this description, may be within the territorial limits of the State, but not within its jurisdiction, so as to subject it to the taxing power.

It cannot be maintained, that the doctrine of implied limitations on the taxing power of the States, is established by the case of *Brown against The State of Maryland*, 12 *Wheat.* 419. The court considered the law of *Maryland*, requiring the importer of foreign articles to take out a license from the

State before he should be permitted to sell a bale or package, as a tax on imports ; and therefore, within the express prohibition contained in the *Constitution of the United States*. On the contrary, when the Supreme Court have been required to speak upon this subject, they have discountenanced the notion of implied restrictions and limitations on the taxing power of the States. In the case of *The Providence Bank against Billings and Pittman*, they say : "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem, that the relinquishment of such a power is never to be assumed."

Waiving, however, this view, and assuming that there are cases, in which the taxing power of the States may be restrained and defeated, by implication; upon what principle is it, in this aspect of the case, that the State is denied the right to impose the tax, now under consideration?

The counsel for the appellant, contends, that the right claimed by the State to tax the appellant's interest in these vessels, is incompatible with the privileges conferred upon him by the license; and, that this being so, the law of *Maryland* must fall on the well established principle, that where there is a conflict, between rights under the law of the local government and a law of Congress, the State law must yield to that which is supreme and paramount.

An answer to the argument presented on this branch of the case, is: that there is, in fact, no incompatibility between the law taxing the interest, which the appellant possesses in these vessels, and the license, authorising them to be employed in the coasting trade.

It is, in all its features, unlike the case of *Gibbons against Ogden*, to which it was assimilated in the argument. In that case, the grant by the legislature of *New York* to *Livingston* and *Fulton* of the exclusive navigation of the waters within the limits of the State, with boats moved by fire or steam, operated as a practical denial of the right conferred on the owner of the steam boat *Bellona*, by her coasting license, to navigate

the same waters. Between the right claimed under the State grant, and the right secured to *Gibbons*, by the laws of the *United States*, there was a direct and actual conflict. Under such circumstances, the Supreme Court could not do otherwise than annul the State law.

But no such collision can result from the tax imposed by the statute of *Maryland*. The State does not pretend to interfere with the right of the appellant freely to navigate, with their vessels, the waters of the *United States*, or require him, as in the case of *Brown against the State of Maryland*, to obtain from the State a license, as a qualification for the exercise of a privilege to which he had become already entitled by a law of Congress.

It has, however, been contended by the counsel for the appellant, that a right to tax, involves the power to prohibit and destroy; that *Maryland* may hereafter determine to banish from her waters all trade; that to accomplish this purpose she may change her fundamental law; and that this power of taxation, if tolerated, may be so abused by her, and diverted from its lawful purpose, as to be directed against our marine, and those branches of commerce and navigation, in the prosperity of which the whole country is concerned, and which have been placed exclusively under the protection of the national government.

But an answer to be given to this argument, is, that to render a State law unconstitutional, or extinguish a State power, by implication, on the ground that it is repugnant to powers vested in the General Government, the repugnancy must be clear, immediate and direct; and not that which is merely speculative, indirect and contingent.

In the case of *McCulloh against the State of Maryland*, the Chief Justice of the Supreme Court expressly stated, that the opinion did not extend to a tax imposed on the interest which the citizens of *Maryland* held in the *Bank of the United States*, in common with other property of the same description throughout the State. And if it be true, as there determined, that the proprietory interest held by the citizens of *Maryland*, in the bank stock of the *Bank of the United States*, could not

be withdrawn from the taxing power of the State, it must follow, that the State retains the power to subject to taxation the interest which the appellant has in these vessels.

With much more reason could it have been maintained, that a tax upon the interest of the stockholder was repugnant to the act of Congress drawn in question, in that case, than that this tax was repugnant to the act of Congress regulating the coasting trade. A tax upon the proprietory interest of the stockholder in the *Bank of the United States*, would operate indirectly upon an instrument created by the national government for the purpose of carrying into execution its acknowledged powers. But this, it was held, could produce no constitutional repugnancy. Unless the repugnancy between the operation of the State law, and the right claimed under the law of Congress is direct and irreconcilable, the State power must be upheld.

The true rule on this subject is to be found in the *Federalist*. It is there stated in the thirty-second number: "That it is not a mere possibility of inconvenience in the exercise of powers, but an immediate and constitutional repugnancy, that can, by implication, alienate or extinguish a pre-existing right of sovereignty."

The distinction is between an immediate, direct, and necessary conflict of powers, where power stands arrayed against power, as in the case of *Gibbons and Ogden;* and one that is merely possible, and often occurs in our form of government, where powers, harmonious in themselves, are seen operating upon the same subject.

We can perceive no repugnancy, between the law of *Maryland*, imposing a tax upon this property, and the acts of Congress, under which an exemption from it has been claimed by the appellant.

We think, therefore, that the imposition of this tax was a constitutional exercise of the taxing power of the State, and that the judgment of the county court must be affirmed.

JUDGMENT AFFIRMED.

Alexander C. Bullitt *vs.* Andrew Musgrave.—*June Term*, 1845.

B authorized *G* to purchase certain personal property of *M*, put up by him on a fishery of *B's;* in case they could not agree, to call in a third person, as to the price; and whatever they agreed, he, *B*, would pay, but said, "recollect that when my claim for damages and rent is settled, whatever remains I will pay it." This was communicated to *M*, who said, "I am perfectly satisfied to leave it to men, but I have done *B* no damage; I owe him some rent, which I have been always ready to pay him." Arbitrators were selected, who awarded, that *M* should "receive the sum of $1000 for the following property, to wit: The houses, sheds, with all the apparatus thereto affixed with nails; also all loose plank over, &c.," and repairs on *Stony Point Shore*, with repairs on wagon house. On this award *G* and *M* endorsed, "we do agree to abide by the within appraisement."

In an action to recover the amount of the award, *B* offered evidence that the claim thereon was compromised, and released by an arrangement in relation to certain actions theretofore pending in *Virginia*, by *B* against *M;* and for the purpose of inducing the jury to believe such arrangement, proved that *M* had cut upon the premises devised to him by *B's* father, wood to the value of $2000. Such proof being offered without objection, *M*, to rebut it, *proposed to prove* that the rented property was greatly improved by him by his course of farming. Held: that this testimony was not admissible as an answer to the alleged trespass.

Whether the land had been well tilled or not, or had been cultivated so as to benefit the defendant, were not questions in issue before the jury.

A lessee cannot set up any claim for voluntarily farming land in a more beneficial manner than the lease required.

When a tenant has been guilty of a trespass in committing waste upon the demised premises, evidence of better than ordinary cultivation of the same cannot have any tendency to diminish or mitigate a claim for damages for such waste.

When a party offered to read a commission to take testimony and the proceedings under it, to the jury, and his opponent objected to all such parts of it as went to establish a particular fact; and the county court permitted all of the depositions to be read, to which the defendant excepted, this court will not consider that tribunal as deciding any other question than the specific one raised.

It was the duty of the county court, as no other objection was taken than the one above adverted to, to permit the residue of the evidence to be read to the jury.

It is not the duty of the court to point out objections to the admissibility of proof.

Since the act of 1825, ch. 117, no point can be insisted upon, by the appellant, which was not raised by the court below; and this court cannot act on a

question which shall not appear to have been presented to the county court.

It is a fatal objection to a prayer, that facts are assumed in it which should be submitted to the jury.

Where the nature of an enquiry before arbitrators, was such as to render notice of their intended action necessary, a prayer founded upon the supposed sufficiency of their award, in an action upon it, which is silent upon the question of notice, and claims that the plaintiff is entitled to recover upon the award, irrespective of notice, though there was evidence of it, ought not to be granted.

Where, from the nature of a submission, the judgment of arbitrators may be influenced or enlightened by the adduction of evidence, the parties are entitled to notice of the time and place of their proceeding to investigate the matters submitted to them.

Where, by an agreement to rent a fishery, the tenant had the privilege of getting timber out of the lands of his landlord for the purpose of erecting buildings which, when erected, were to be the property of the landlord, so far as his timber was used, and the tenant was to be at liberty to remove the materials he might supply, so far as it could be done without injury to the landlord's interest; an agreement was subsequently made to purchase *M's* materials, and refer the value of them to arbitrators, who, without notice to the parties, proceeded to make an award. HELD: that under such circumstances it was an open question of fact, whether matters had not been awarded upon, which had not been submitted.

Where matters not submitted are included in an award, which cannot be separated from the matters referred, the award is void, unless what had been done by the arbitrators has been subsequently ratified by the parties to be affected by their act.

An agent appointed to submit a claim to arbitration is not thereby authorized to ratify and confirm the award when made.

When the design of one party was to purchase, and the other to sell, materials, which, by the terms of a lease, the latter had a right to remove at the end of his term, and an agreement in relation to such purchase was submitted to arbitrators, if purchase money is to be paid, it should appear what were the articles appraised, so that the vendee might obtain title; and where some of the articles were particularized, and some were not, but were included under an *et cetera*, the award is uncertain and void.

All questions necessarily raised by a prayer in the county court, we must presume were brought to the attention of that tribunal.

APPEAL from *Baltimore* county court.

This was an action of *assumpsit*, commenced on the 3rd September 1842, by the appellee against the appellant.

The plaintiff declared for work done, materials found, goods sold, for money had, and upon an *insimul computasset*.

The defendant pleaded *non assumpsit*, on which issue was joined.

1st Exception. The plaintiff to support the issue on his part, offered in evidence the following depositions, viz:

1. That of *George Moore*, taken for the plaintiff under the act of 1828, who deposed, that he had knowledge of the fishing shore called *Possum Nose*, rented by *Andrew Musgrave* from *Thomas James Bullitt;* that he does not know whether there were any improvements on said fishery before said *M.* went there, and does not know what improvements said *M.* put thereon; that witness came on from home, which is at *Havre de Grace*, having work to do on the *Potomac*, some time in October or November 1841; that at that time witness and *Sellman*, and *Crook* were in partnership, which was not then dissolved, and they then had it in contemplation to rent the *Possum Nose* fishery. Witness asked *Mr. Sellman* whether he had executed a lease with *Mr. Bullitt*, the defendant, or not, he stated that he had not; that he had seen the lease of old *Mr. B.* to *A. M.*, which gave *M.* the power to remove all the buildings and improvements put on said fishery by said *M.*, and as witness was going on, he authorised the witness to say to *Mr. B.*, the defendant, unless he, said *B.*, would purchase the improvement, or suffer them, (the witness and *Sellman*, and *Crook*,) to purchase them and retain out of the rent, they would have nothing to do with the shore. On the 9th of December then next following, as witness thinks, or thereabouts, it was however on the day the arbitration took place, witness called at *Mrs. Murdoch's*, at *Dumfries*, where *Mr. B.*, the defendant, was at the time, and repeated to *Mr. B.* the said conversation which had taken place between the witness and *Sellman*. *Mr. B.* stated that he had sued *M.* for a trespass, and that said *M.* owed him some rent, consequently they did not speak; that he, said *B.*, authorised the witness to go and buy the property of *M.*, put up by said *M.* on the *Possum Nose*, as low as witness could, and in case witness and *M.* could not agree, to leave it to two men, and if they could not agree, to call in a third person, as to the price, and that whatever they agreed, he, said *B.*, would pay it; but, said he, recollect that whenever my

claim for damages, and I expect to recover a good deal, and rent is settled, whatever remains I will pay it. Witness went down on the shore the same morning and saw *Mr. M.* and stated distinctly to *M.* the conversation which witness had had with *B.* *Mr. M.* said, "I am perfectly satisfied to leave it to men, but I have done him no damage; I owe him some rent, which I have been always ready to pay him, but he distrained on my property before it was due." Witness and *Mr. M.* went down to the fishery, and *Mr. M.* asked $1500 for the improvements, and witness offered him $500. Witness then told *M.* that it was impossible for them to agree, and that he supposed they would have to leave it to men, and *M.* said that he was perfectly satisfied to do so; witness said that he was a stranger, and unacquainted with the men there, and wished to have a competent man on his side; that witness would like to have witness' partner at the fishery above, being the *Marsh* fishery, *Zebulon A. Kanky*, as one of the referees, but that he, said *M.*, might object to said *Kanky* on that ground, that he was witness' partner. Said *M.* stated that he considered *Mr. K.* a gentleman, and that he had no objections to him, and that he, said *M.*, would choose *Mr. Anness*. Witness and *M.* then both agreed, if the referees should not agree, to call in a third person, and whatever their decision might be, to abide by it. The referees, *Kanky* and *Anness*, did not agree, and they called in *Cockerill*, and the paper herewith filed and marked "Exhibit A," is the arbitration which the said three referees *K. A.* and *C.* signed; that the said paper marked Exhibit A, was prepared under the authority of *Mr. B*, the defendant, and unless it had been prepared, witness and *Sellman & Crook* would not have rented said *P N.* fishery. *Sellman & Crook*, witness being a silent partner with them, rented at the annual rent of $850, the *P. N.* fishery, *Stony Point* fishery and *Timber Branch* fishery, but only worked the *P. N.* fishery. Witness considers the rent very reasonable with the improvements, but would not have the *Possum Nose* fishery for one year for nothing, if the improvements mentioned in the arbitration had not been there. The other two fisheries, *Stony Point* and *Timber Branch*, witness considers as worth nothing in any

case. After the conversation between *M.* and witness, *M.* took witness over the improvements on *P. N.* fishery, and put witness into possession, and said to him, "mind, this is your property, I deliver it all over to you, and if it burns down, it is at your risk." Witness considered, that in receiving this property from *Mr. M.*, he took charge of it under the authority he derived from *Mr. B.* That he purchased the said improvements for *Mr. B.*, and not for *S. & C.* and himself; that witness signed the agreement endorsed on Exhibit A, and that in signing said agreement as *George Moore & Company*, he considered himself as acting as the agent of *Mr. B.*, the defendant; that witness, when he went down to *P. N.* fishery, offered *Mr. M.* $500 for the improvements, but, on account of the snow, was unable to ascertain their extent and value; that afterwards, when he came to know them fully, he considered the value put on them by the arbitrators as low enough. *Mr. B.* was on the ground on the day of the arbitration, but witness does not know whether he talked to the arbitrators, or went over the buildings and improvements. That witness has heard the deposition of *Nicholas Suter* in this cause, and that all the improvements mentioned in said deposition, by said *Nicholas Suter*, existed when witness went to *Possum Nose* fishery, and the other places, as he has above mentioned; that a high freshet in 1842, carried away sixty feet of the shed at *Possum Nose*, which witness saw there when *Sellman & Crook* took possession of the shore, and which, in consequence, *Mr. Suter* could not have seen; that witness collected as many of the boards of the said sixty feet of shed as he could find, and put them away; that two of the houses are covered with shingles, with the exception of about three feet on one end of one of them.

2. *Nicholas Suter*, a witness for the plaintiff, also, proved various repairs and improvements put up on the *Possum Nose* fishery from 1835 to 1843, necessary to a fishery.

3. *John Rogers*, also a witness for the plaintiff, gave evidence of his improvements; and that in 1839, the buildings and improvements on *Possum Nose* fishery were complete, and the best on the river for a rented shore. Witness has followed the fishing business nearly twenty-four years, and the

improvements, in his opinion, would be worth full two years rent of the unimproved property. During the space between 1836 and 1839, the whole character and condition of the shore aforesaid, was much improved by *Mr. Musgrave*, so as to increase its value as a fishing property. While witness was there, he did not observe any wood-cutting going on; did not see any wood carried off. A field or two near the shore was enclosed with pine poles, barely enough for a fence.

4. *Henry Moore*, a witness for plaintiff, also proved similar facts.

5. *Thomas M. Davidson* also proved, that he never had any conversation with *Mr. Bullitt* relating to said shore, but was present at a conversation between said *Bullitt*, the defendant, and said *Musgrave*, the plaintiff, about the paying for the improvements on said shore. It was about one year ago, either in last February or last March. Witness and *Mr. Musgrave* were going down *Pratt* street together, and they stopped into *Mr. Lutts'* hotel; they went in, and *Mr. Bullitt* was sitting there behind the stove. *Mr. Musgrave* went up to him and slapped him on the shoulder, and asked him how he was. Some little conversation took place between them, and at last *Mr. Musgrave* said to him, "I think it very hard *Mr. Bullitt*, that I cannot get paid for my property." *Mr. Bullitt* replied, that their lease would expire in about two years; he then began to talk about *Mr. George Moore's* fishing the place, and the character of the place. *Mr. Musgrave* said again, that he thought it very hard that he could not get paid for his property, and *Mr. Bullitt* said, "you must and shall be paid for your property," and told *Mr. Musgrave* that his property was still there. The conversation all this time was concerning the said fishery.

The exhibit marked A, referred to in the aforegoing depositions, is as follows, to wit:

Report of Mr. Wm. Cockrill, Richard Anniss and Z. A. Kanky, as regards the property on *Opossum Nose* fishery.

We agree, that *Mr. Andrew Musgrave* should receive the sum of $1000 for the following property, to wit: The houses, sheds, with all the apparatus thereto affixed with nails, also all

loose plank, oven, &c. Capstan, platform and gallows, and repairs on *Stony Point* shore, with repairs on wagon house.

November 29th 1841.

WM. COCKRILL,
RICHARD ANNISS,
Z. A. KANKY.

(Endorsed.) We, *Andrew Musgrave* and *George Moore & Co.*, do agree to abide by the within appraisement, as witness our hands and seals, this 29th November 1841.

ANDREW MUSGRAVE,
GEO. MOORE & CO.

John P. Phillips, for the defendant, testified, that he was counsel for *Alexander C. Bullitt* in two cases of attachment or distress for rent, in the county court of *Prince William*, against *Andrew Musgrave*, and was also counsel for said *Bullitt* in three actions of covenant in the circuit superior court of law and chancery of *Prince William* county, and in an action on the case in the same court; all of the said cases were in the name of said *Bullitt*, in his own right, or as administrator of the late *Thomas J. Bullitt*, of *Maryland*, and involved questions under two leases, made by the said *Thomas J. Bullitt*, in his life time, to said *Andrew Musgrave*, &c. The papers in the said cases in the county and superior court, will shew the objects of each suit, better than I can explain them here. At the May term of the circuit superior court of law and chancery for *Prince William* county, 1842, *Alexander C. Bullitt* was in attendance upon that court, and he did authorise me to compromise and settle his differences with said *Musgrave*, arising under the said leases. I did converse with said *Musgrave* at the time of the term of the court aforesaid, on the subject of his controversies with said *Bullitt*, with a view to carry out a compromise between them, which I understood said *Musgrave* to be anxious to effect. The terms of the compromise, as I understood it, was, that the said *Bullitt* should dismiss all his suits against said *Musgrave*, except one, and take a judgment on that one against said *Musgrave*, for the sum of $452.13, with interest from the first day of May 1842, and the costs of that suit; and that thereupon, all matters of difference between said *Bullitt* and said

Musgrave, arising upon said leases, were ended and settled. I certainly considered *Mr. Bullitt* and *Mr. Musgrave* as having by that compromise, settled all differences between them arising upon said leases. I do not now recollect that I heard of any other matters between them, except some small accounts for money, rent, &c., which were included in the settlement. I understood the parties as being desirous to settle all their differences, and I have no doubt that was the understanding of both parties at the time. I certainly should not have advised *Mr. Bullitt* to dismiss his suits against *Mr. Musgrave*, and leave *Musgrave* at liberty to set up any claim he might make against *Bullitt*. After the compromise was agreed upon, and before judgment was entered up, *Musgrave* paid to *Bullitt* the sum of $300 in cash, and the judgment was entered up for the residue of said sum, being $152.13, with interest and costs as aforesaid. In the conversations on the subject of the compromise, the claims of said *Musgrave* under the lease for the fishery shore, were alluded to; he set up in those conversations, all his claims, as I understood him, under the lease. I recollect the plank, &c., which, under the lease, he was to have a right to remove, were alluded to. I considered, and as already stated, I believe *Mr. Musgrave* considered the compromise as a full settlement of all his demands against *Bullitt*, and all *Bullitt's* demands against him under said lease. I do not know the character of *Mr. Musgrave's* suit against *Mr. Bullitt*, and therefore cannot say that I know any thing further, which would be of any service to the parties.

Joseph S. Farrow also proved, that during the May term of the circuit superior court of law and chancery of *Prince William* county, in 1842, and after *Musgrave* and *Bullitt* had compromised their differences, I heard *Musgrave* say that they, the said *Musgrave* and *Bullitt*, had settled their affairs or business, and that he was glad of it; that he had to pay several hundred dollars, some three or five hundred dollars, and further said deponent saith not.

Washington S. Norville also proved that he was at the May term of the superior court of *Prince William* county in 1842, in company with the plaintiff, *Musgrave*, who desired me to

endeavor to bring about a compromise of the several suits pending between the plaintiff and defendant, for damages for cutting wood and for rent; the said plaintiff authorized me to propose to the defendant, that if he would dismiss his suits for damages for cutting wood, he, the said defendant, might take judgment for his rent, and it should end their legal controversies in *Virginia*, and fully discharge all claims and demands of every nature whatever, which the plaintiff had against the defendant under dealings in *Virginia*. I was not present when any conversation took place between the plaintiff and *John P. Philips*, nor was I present when the final arrangement was made between the parties as to their differences above referred to. I heard the plaintiff say, on the day of the compromise, that he would sue the defendant in *Baltimore*, and I am under the impression that he made this declaration before the compromise was made. I never heard the plaintiff say any thing about such a suit afterwards. Acting as a constable of *Prince William* county, I received an attachment issued by a magistrate of said county, a copy of which, marked A, is hereunto annexed as a part of this answer; under which, on the date of said warrant, I went upon the premises leased by *Bullitt* to *Musgrave*, and seized the property mentioned in my return thereon, but did not remove it; it was suffered to remain in the care of *Musgrave's* manager, and three days afterwards was surrendered, upon *Musgrave* suing out a writ of replevin. I heard *Bullitt* say he was afraid *Musgrave* would remove the property before the rent became due, but any declaration as to his intentions against *Musgrave*, further than to make his rent, I did not hear. I have been on the premises, assisted by a gentleman, *Mr. Henry Chapman*, measured the plank claimed by the plaintiff, and find, by calculation, to amount to about fifteen thousand feet, and do think it worth, at the expiration of the lease, not more than fifty cents per hundred feet; that it is now in rapid state of decay. At the request of the defendant, I have been over the land embraced in the lease, to ascertain as near by judgment, the quantity of wood cut from the land; I judge about one thousand cords; was worth at the time to defendant one dollar per cord, standing, it being near the river banks. I

think the wood was worth, at that time, one thousand dollars; the fence made by *Musgrave*, was of poles. I think that a large portion of wood carried away would have made rails; could have been applied to farming purposes. I further state, that at the time I levied warrants of distraint and attachment, the said plaintiff acknowledged that he was indebted to *Bullitt* after crediting some orders drawn on the plaintiff, which said *Bullitt* directed to allow if he paid the remainder of the rent. At the time of the compromise, the only item in dispute was the suit for the trespass on terms of the lease, and damages for breach of covenant. I think the fishing shore occupied by *Musgrave*, when rented, if it had been put up to the highest bidder, would have rented for $1000 or $1200.

And also the following leases:

Memorandum of an agreement made and entered into this 16th August 1836, between *Thomas J. Bullitt* of the one part, and *Andrew Musgrave* of the other part. The said *B.* agrees to let and demise, and doth hereby let and demise, unto the said *M.*, the fishing shore of the said *B.*, on the *Potomac* river, commonly called the *Possum Nose* fishery, for the term of four years, to commence on the 1st day of January 1838. In consideration whereof, the said *Musgrave* doth hereby agree with, and bind himself to the said *B.*, to pay him, the said *B.*, the annual rent of $500, at the following periods, that is to say, on the 1st day of July in each year during the said term. This fishery is to extend down the river to the four acres of land devised by the father of the said *B.* to his sisters, and laid off by the said *B.* for his sisters and their heirs, and no further, and is to extend up the river so far as not, in any manner, to obstruct or interfere with the *Timber Branch* fishery, and no further, it being the intention that the *Timber Branch* fishery shall be and remain free and clear from any obstruction or interruption whatever. The said *M.* has the privilege of getting timber out of the woods of the said *B.*, for the purpose of erecting buildings for the accommodation of the said *Possum Nose* fishery, which, when erected, are to be the entire property of said *B.*, so far as his timber is used, and to be carefully preserved for the time. The said *B.* is to be at no other expense whatever.

"The said *M.* is at liberty to remove such materials *as he may supply* towards the buildings, other than those from the woods of the said *B.*, so far as it can be done without exposure of, or injury to, the materials towards the said buildings attained out of the woods of the said *B.* The said *Musgrave* is to deliver up the said demised premises at the end of the said term to the said *Bullitt*, his heirs or assigns, peaceably and promptly.

In witness whereof, the said parties have hereto set their hands and seals. THOS. J. BULLITT, (Seal.)
ANDREW MUSGRAVE, (Seal.)

Memorandum of an agreement made and entered into, on this 8th day of September 1836, between *Thomas James Bullitt*, and *Andrew Musgrave* and *John H. Williams*, of *Prince William* county, in the State of *Virginia*, of the other part. The said *Bullitt* agrees to let and demise unto the said *Musgrave* and the said *Williams*, for and during the term of five years, to commence on the 1st day of January next, a parcel of land, belonging to the said *Bullitt*, lying and being in *Prince William* county, in the State of *Virginia*, in a neck between the river *Potomac* and *Quantico* creek, that is to say, the arable and woodland only, contained within the following limits, with the exceptions hereinafter mentioned: Beginning, &c. All fisheries, and all land necessary for the full enjoyment and accommodation thereof, excepted, and the free passage of the tenants and agents of the said *Bullitt*, to and from the fisheries also excepted; it being the intention of these presents, that the said *Musgrave* and *Williams* are not, in any manner, to molest or interrupt the fisheries, the land needful for the enjoyment and accommodation thereof, or the free passage of the tenants and agents of the said *Bullitt*, to and from the same as heretofore. In consideration whereof, the said *Musgrave* and *Williams* do hereby agree with, and bind themselves to the said *Bullitt*, for the annual rent or sum of money following: that is to say, the sum of $100, current money of the *United States*, on the last day of December, in the year of our Lord, 1837, and the rent or sum of $200, like money, on the last day of December in each and every year thereafter, during the said term. The said *Musgrave* and *Williams* are at liberty to

cut down, for the use of the demised premises; that is, for buildings, fences, fuel, and other purposes, all the second growth of wood and lumber, on the river adjoining the field now in the occupation of *Bell* and others, and being within the lines aforesaid, and to sell and dispose of, for their own benefit, the lapse of the timber cut down for rails and other wood that cannot be carefully applied to the purposes aforesaid, and otherwise would go to decay and be lost; but the original growth of wood and timber next to the creek, is to be preserved for the support of the demised premises, save only what may be necessary for the use of the farm, after the reasonable and discreet consumption of what is before permitted to be cut down. In case of failure of rail timber, within the lines aforesaid, during the said term, after the discreet consumption thereof, the said *Musgrave* and *Williams* are at liberty to procure rail timber for the use of the said farm out of the other woods of the said *Bullitt*. Signed," &c.

The defendant also proved, that *M.*, between 1838 and the spring of 1841, cut and sold wood off of said land, to a value amounting from $2000 to $2750; the plaintiff proved that such cutting was known to the agent of *T. J. B.*, in his, *B*'s life time, and to the defendant, after said *Thomas*' death.

The plaintiff then offered in evidence the following depositions, taken under a commission, viz:

The deposition of *John W. Tyler* stated, that he knew of several suits between the parties, to wit: Two attachments and four other suits. Two of the latter suits were brought against *A. Musgrave* and *Jno. W. Williams*, one by *Alex. C. Bullitt*, in his own right, and the other as representative of *Thos. J. Bullitt;* the third was an action to recover $100, claimed to be due the estate of *Thos. J. Bullitt*, from *A. Musgrave*, and the fourth was brought by *Alex. C. Bullitt*, to recover a rent of $500. That he was the attorney of *A. Musgrave*, in the suits alluded to in his previous answer, and the defence made to one of the attachments was, that the attachment was defective, which was sustained by the court, and the attachment was quashed. The defence to the other was, that the amount claimed had been paid, and there was in the progress of the cause a judg-

ment in *Musgrave's* favor for costs. Deponent says, that he does not recollect particularly the courts at which the attachments were ended. The other suits spoken of were in the circuit superior court of law and chancery for *Prince William*, and were settled, as deponent believes, at the May term 1842, of said court, under the following circumstances: During the court, there were some general propositions for compromise, and having been informed by *A. Musgrave* that the suits for damages for cutting and carrying away wood, &c., was vexatious and frivolous, and that he had a receipt for the $100 claimed in another suit, and that he owed the rent, subject to some offsetts; there was a proposition made to take judgment given for the rent, if the plaintiff would dismiss the other suits. This proposition was not acceded to, and there seemed to be no probability of a compromise. When the cases were called in their order on the docket, the judge of the court refused to set in the cases, on the score of his being a relative of the plaintiff, and directed them to be sent to another judicial circuit. After it was ascertained that no judgment could be had for the rent during that term of the court, and that increased trouble and expense would be incurred by the removal of the causes, the proposition for compromise was renewed, and it was finally agreed that judgment was to be given for the rent claimed, subject to offsetts agreed on by the parties, amounting to a small sum, and that the other three cases were to be dismissed; agreed, which was accordingly done. The deponent cannot tell the motives or inducements to the settlement, further than his answer may disclose. The deponent says, that he knows of no agreement, contract or promise, on the part of said *Musgrave*, to abandon any action or cause of action in *Baltimore*, or elsewhere, that he had against said *Bullitt*, in consideration of *Bullitt's* dismissing the suits aforesaid, in *Virginia*. The deponent says that he was the attorney of said *Musgrave*, and certainly never heard of any terms or conditions as mentioned in the foregoing interrogatories, and thinks that a client would usually mention such matters to his counsel if they existed.

The deponent says, that the copies from the order book of the court, marked A and B, and hereto annexed and certified by the clerk, shews the terms of the settlement as deponent understood it. The judgment for $152.13, with interest from 1st May 1842, being the balance of rent of $500, after paying down the sum of $300 in money, or thereabouts, and allowing the offsetts. The deponent says, that *A. Musgrave* conferred with him both before and after the compromise, as to bringing suits for damages against *A. C. Bullitt*, and also as to the expediency of suing him in *Maryland* or in *Virginia*, and finally concluded, as a matter of convenience to himself, to bring the suits in *Baltimore, Md.*, and further this deponent saith not.

A—Virginia. At a circuit superior court of law and chancery, of *Prince William* county, held on the 19th day of May 1842.

Alexander C. Bullitt, plaintiff, *against Andrew Musgrave*, defendant. In covenant. This day came the plaintiff, by his attorney, and the defendant, by *John W. Tyler, Esq.*, his attorney, acknowledges the plaintiff's action, and agreed that the plaintiff has sustained damages in this case to the sum of $152.13, with legal interest thereon from the 1st day of May 1842, till payment. Therefore it is considered by the court, that the plaintiff recover against the defendant, his damages acknowledged as aforesaid, and his costs, by him about his suit, in this behalf expended; and the said defendant in mercy, &c.

B.—*A. C. Bullitt*, plaintiff, *against A. Musgrave*, defendant. *T. J. Bullitt's* adm'r, pl'ff, *against* same def't. In covenant. Same plaintiff *against* same defendant. In case.

These causes are dismissed, being agreed between the parties.

The foregoing are true transcripts from the records of the circuit superior court of law and chancery, of *Prince William* county, in the State of *Virginia*. In testimony whereof, I have hereto set my hand, this 8th day of August 1843.

P. D. Lipscomb, Cl'k.

Daniel Ratcliffe deposed, that he concurred in the statements of *John W. Tyler;* and that he was present at a conversation between *A. C. B.* and *A. M.*, in the town of *Dumfries*, touching

their differences in *Virginia*, and endeavored to effect a settlement of the same, but failed. The difficulty seemed to arise out of matters of account, and I heard nothing said about damages for trespass committed by *Musgrave*. I have lived for the last six or eight years within four miles of the farm and fishery rented by *Mr. Musgrave* of *Mr. Bullitt*, and have had frequent opportunities of observing the manner in which the same was managed, and hesitate not to say that I was surprised when I heard that *Mr. Bullitt* had instituted proceedings against *Mr. Musgrave* for damages on account of trespass committed by him. When *Mr. Musgrave* took the property alluded to, it was of little value comparatively, and when he left, it possessed as much character as any of a similar description in this whole section of country, and in my estimation, this change is ascribable in a great measure, to *Mr. Musgrave's* judicious and prudent management. The conversation above alluded to, took place prior to the middle of May 1842, and subsequent to the valuation of *Musgrave's* property on *Bullitt's* fishery by *Richard Anniss*, *Z. A. Kanky* and *William Cockrill*, *Esq.*

James Lee also proved, that *Musgrave* improved the rented farm; knew of trespass, and seizure under distress by rent. Other proof was offered of the improvement of the rented premises.

Papers referred to in the aforegoing depositions.

C.—A writ of *replevin*, *Musgrave vs. Bullitt*, issued 8th May 1841.

D.—Affidavit for an attachment by *B.* against *M.*, for rent due *B's* father, 6th May 1841. Return attached, and quashed.

The plaintiff offered to read the depositions, but the defendant objected to all such parts thereof as went to shew, that *Musgrave*, by his farming of said land, benefitted it for the defendant or his father. The court, (PURVIANCE, A. J.,) permitted all of said depositions to be read to the jury. The defendant excepted.

2ND EXCEPTION. The plaintiff and defendant having given in evidence the testimony stated in the foregoing exception, which it is agreed shall form part of this exception, the plaintiff offered the following prayer.

"That if the jury believe the evidence of the plaintiff's witness, *George Moore*, in relation to the agreement of reference, executed by the plaintiff and *George Moore & Co.*, dated 29th November 1841, and the report and award made under said reference, also dated 29th November 1841; and if they believe that said reference, and report and award was made, as stated by said witness *Moore*, that then the plaintiff is entitled to recover the amount of such award, unless the jury shall also find from the evidence in the case, that afterwards it was agreed by and between the plaintiff and defendant, that the amount so due to the plaintiff, in virtue of said reference and award, should be considered as compromised and released by the arrangement made in *Virginia*, in May 1842, mentioned in the evidence of the witness *John W. Tyler*, and the other witnesses testifying in regard to said arrangement, under the commission to *Virginia*."

Which the court gave, and to which direction and opinion of the court, the defendant excepted.

The verdict and judgment being for the plaintiff below, the defendant there prosecuted this appeal.

The cause was argued before Archer, C. J., Dorsey and Martin, J.

By McMahon and Glenn for the appellants, and
By Reverdy Johnson for the appellees.

Archer, C. J., delivered the opinion of this court.

The exceptions in this case are on the part of the defendant. The first has reference to the admissibility of evidence.

The plaintiff offered to read in evidence a commission returned on the 22nd of August 1843; but the defendant objected to all such parts of it as went to show that *Musgrave*, by his farming of the land leased by the defendant's father to him, benefitted it for the defendant, or his father. By the depositions of several witnesses taken under this commission, it was proved, that the farming of the land had been so conducted as to benefit the defendant. This constituted the portion of the evidence sought to be excluded.

The action was in *assumpsit*, and was brought to recover the amount of an award, signed by arbitrators on the 29th of November 1841: the defence to this action consisted of evidence offered on the part of the defendant, to show that the claim on the award was compromised and released by an agreement, entered into between the parties in *Virginia*, in May 1842. And the defendant, for the purpose of inducing the jury to believe that such arrangement as was insisted upon by him had been made, offered proof, without objection, that the plaintiff had cut upon the demised premises between 1838 and the spring of 1841, and sold off the premises wood to the value of from $2000 to $2750. The defendant deemed the proof of a claim to damages for trespass, in cutting the wood to so great an amount as $2000 or $2700, as important to show that it was improbable claims to such an extent, over and beyond his claims for rent, would be compromised for so inconsiderable a sum as that for which judgment had been entered. Whether this evidence was admissible or not, we are not called upon to determine; but the evidence objected to is wholly inadmissible, unless upon some ground it could be considered as an answer to the alleged trespass in cutting the wood: for whether the land had been well tilled or not, or had been cultivated so as to benefit the defendant, were not questions in issue before the jury. No claim could be set up by the lessee for voluntarily farming the land in a more beneficial manner than the lease required. Nor could the evidence, upon any view of it, be considered as furnishing any answer to the alleged trespass. It could not have any tendency to diminish, or mitigate the damages. We, therefore, think the testimony objected to was wholly inadmissible, and that it should, consequently have been rejected by the court.

It has been urged by the appellant, that the court below not only decided the evidence objected to by him, to be admissible, but that all the evidence taken under the commission was admissible, and proceeding on this assumption, various objections have been urged to different portions of the evidence. But we have not considered the court below as deciding any other question than the specific question raised, and which we have

examined. The court, it is true, did permit the whole of the evidence to be read to the jury, after disposing of the particular objection raised, and this it was their duty to do, as no other objection was taken than that which has been adverted to. It was not the duty of the court to point out objections to the admissibility of other portions of the evidence taken under the commission, but they might well await the action of the complainant in relation thereto, and if no other objection was urged, the court only performed their duty, in allowing the commission, and the evidence taken under it, to have been read to the jury. Since the act of 1825, ch. 117, no point can be insisted upon by the appellant which was not raised in the court below, and we cannot act on a question which shall not appear to have been presented to the county court. Believing the only point decided by the county court, to have been the question raised on the particular evidence objected to, we cannot entertain the appeal in relation to the objections urged to other portions of the evidence, taken under the commission.

The plaintiff, in the second bill of exceptions, prayed the court's opinion to the jury, that if the jury believe the evidence of the plaintiff's witness, *George Moore*, in relation to the agreement of reference, also given in evidence, and executed by the plaintiff, and *George Moore & Co.*, dated 29th Nov. 1841; and the report and award made under said reference, also dated 29th Nov. 1841; and if they believe the said reference and report, and award was made, as stated by the said witness, *Moore*, that then the plaintiff is entitled to recover the amount of such award, unless the jury shall also find from the evidence in the case, that afterwards it was agreed by, and between the plaintiff and defendant, that the amount so due to the plaintiffs, in virtue of said reference and award, should be considered as compromised, and released by the arrangement made in *Virginia* in May 1842, mentioned in the evidence of the witness, *Jno. W. Tyler*, and the other witnesses, testifying in regard to said arrangement, under the commission to *Virginia*.

There are fatal objections to the instruction prayed. Facts are assumed which should have been submitted to the jury. Thus, the question of notice, was a fact to be found by the

jury. There was abundant evidence to show notice; but the prayer is not put on the hypothesis of notice, and no matter what the jury might believe on the subject of notice, they would have been bound by the instruction granted, to have found for the plaintiff, if they believed the evidence of *Moore*, in relation to the reference, report, and award, provided they further believed that no compromise had been made, as mentioned in the instruction.

The nature of the enquiry by the arbitrators, was such as to render notice necessary. By the agreement between the parties, of the 16th of August 1836, *Musgrave* had liberty to remove such materials as he might supply towards the buildings, other than those from the woods of *Bullitt*, so far as it could be done without exposure of, or injury to the materials towards the said buildings, obtained out of the woods of the said *Bullitt*. It was the purchase of these materials by the one, and the sale by the other, which was the object of the reference. Had notice been given, it is fair to presume, that evidence might have been adduced, to show that injury might arise from the removal of some of the materials furnished, within the meaning and terms of the contract. At all events, the judgment of the arbitrators might have been influenced or enlightened, by the adduction of evidence on the part of the defendant.

It was, moreover, a question of fact to be determined by the jury, whether matters had not been awarded upon, which had not been submitted by the parties, for, if such matters had been included in the award, which could not be separated from the matters referred, the award would be inoperative and void, unless indeed what had been done by the arbitrators, had afterwards been ratified by the party, to be affected by such award.

There was evidence that buildings had been erected on *Stony Point* by *Musgrave*, and the award finds for repairs on the *Stony Point* shore.

The reference agreed upon was to value the property on the *Opossum Nose Fishery* only; and if repairs were valued, which had been put up on *Stony Point Fishery*, such repairs were not within the submission. It is true this enquiry would be

immaterial, if, after the appraisement had been made, the defendant had ratified the same. But the instruction does not require the jury to enquire into the fact, whether there had been a subsequent ratification of the award, in case of any excess; but the jury are instructed to find the amount of the award, if they believe the evidence of *Moore* in relation to the reference and award, and if they believe the reference, report, and award were made, as stated by *Moore*. Now this instruction is silent as to any evidence in relation to the endorsement on the award signed by *Musgrave* and *Moore & Co.;* and if that had been put to the jury, on their belief of the evidence of *Moore* on that subject, still it would not follow, that the jury must find the amount of the award for the plaintiff, for *Moore* does not prove any communication with *Bullitt* in relation to such ratification, or that any power was imparted to him otherwise than by the original power. He does not directly prove his authority, but only states that, what he did, he considered he was doing, as agent of *Bullitt*, the defendant. It was but his opinion, which to besure, had been admitted as evidence to the jury, without objection; and if the jury had believed he had truly stated his belief, it still was not imperative upon them as to the fact, whether authority had been imparted to him by *Bullitt* to ratify the award.

But in addition to the above objections to the instruction given by the court below, there is another which, to our minds, is conclusive. The award is wholly uncertain, and therefore void; and if all other objections were waived, it could not furnish the basis of the instruction granted. The design of *Bullitt* was to purchase, and *Musgrave*, to sell the materials, which, by the terms of the lease, the latter had the right to remove. If the sum awarded, the purchase money, is to be paid, it should sufficiently appear what were the articles appraised, so that the vendee might obtain a title. In this respect, we consider the award uncertain; certain articles are particularized, but some are not, but are included under an *et cetera*. These terms must mean something, but what, can only be left to conjecture. The parties ought not to be left to speculation; and we could not sanction an award so indefinite.

We consider these questions as all necessarily raised by the prayer offered, and must presume they were brought to the attention of the court below.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

E. S. Buchanan, et al., *vs.* Alexander Lorman, et al. *June Term*, 1845.

A vendee of an estate, in an unexecuted contract, is entitled to have that for which he contracted, before he can be compelled to part with the consideration he agreed to pay.

The ability of the vendor to convey should exist, when his duty by the contract arises to convey; or at the time of a decree for a conveyance, where time is not of the essence of the contract.

A vendee is not bound to take an estate fettered with incumbrances, by which he may be subjected to litigation to procure his title.

After a contract for the sale of land, the vendor mortgaged the same, and upon a bill filed by the mortgagee for a sale, to which the vendee was no party, a decree was passed to sell, and the trustee directed by the decree to convey to the purchaser the rights of the mortgagor and mortgagee, which was executed by a sale and deed to the purchaser, in conformity with the decree, to all which the vendor voluntarily consented. Held:

1st. That this decree and sale operated to extinguish the vendor's title, and pass it to the purchaser.

2nd. That when the contract of sale had ripened into maturity, the vendor, by his own consent, had stripped himself of every vestige of title, legal and equitable, in the land he had sold, was in no condition to comply with his contract to convey, and had no legal capacity to enforce a reconveyance of the title to him, so that he might comply with his contract of sale.

3rd. That the vendee was not bound to take a title thus embarrassed, and embark in a lawsuit against an adversary claimant.

4th. That if the vendee had gone into equity to compel a specific execution of the contract, she must have averred a compliance on her part with the terms of the contract, or have offered to pay the purchase money.

5th. Where a bill seeks a rescission of a contract, on the ground of want of title, a payment or offer to pay is unnecessary.

6th. Where the consideration of a contract of sale wholly fails, the vendor, nor his assignees who stand in his stead, ought not to be allowed to recover the purchase money, and a judgment on a bond for it will be perpetually enjoined.

The vendor of land, assigned the vendee's bond, and judgment against him, for the purchase money to *L*, who, *before* the obligation to convey had matured, proceeded against the vendee's land *in another State*, obtained a decree against him for a sale, sold, and purchased the same. *L* had notice of the consideration of the bond and judgment which had been assigned to him, which entirely failed. When by the terms of the contract of sale, the period of conveyance had arrived, the vendor had no title to convey, nor any legal capacity to enforce a reconveyance to him; HELD, that if these defences had been brought to the notice of the court of equity, in the State where the decree for the sale of the vendee's land had been obtained, this court is bound to presume, that no decree would or could have passed against him, until the estate sold to him had been relieved from its embarrassments, and until the vendor, by so doing, could have shown himself in a condition to convey, according to his contract of sale.

The decree in the other State must be considered as conclusive, as to the merits, upon the equities existing anterior to it, and as having the efficacy of a domestic judgment or decree, and it could not there be examinable upon any ground of equity existing prior to its passage.

But upon an equity arising subsequent to such decree, which would make it inequitable in the present defendants, who obtained, to enforce it, the complainants in this bill may enjoin them from enforcing it.

When the person of the defendant is in *Maryland*, though the land in controversy is in *Virginia*, and the object is to vacate a decree of a court of the latter State, though this cannot be done, yet the defendant seeking to enforce such decree, may be enjoined from accepting a conveyance of lands purchased by him under it, or if he has obtained title inequitably, may be decreed to reconvey the same.

Where a vendee, upon a contract for the purchase of land, has been let into possession, and it is afterwards rescinded by decree, he is responsible for any deterioration of the property arising from his improvidence, or culpable negligence, but not otherwise; and for all the time it was occupied by him or his agents, he should account for rents and profits.

There is generally a great disproportion between rents and profits, and interest on the purchase money, so that there is no propriety in awarding interest, where the sale is rescinded.

When a contract is rescinded, a court of equity could never treat the vendor as entitled to the purchase money, nor consider the vendee as the owner of the land.

Where the court determined that a contract ought to be rescinded, in a case where there was no legal evidence to show the possession of the vendee or its duration, or whether the deterioration of the property proceeded from casualty or negligence, nor the value of the rents and profits, they neither reversed nor affirmed the decree of the chancellor, but remanded the cause under the act of 1832, ch. 302, that evidence might be taken on those subjects.

Appeal from the Court of Chancery.

This cause was before the court at December term 1840, 11 *Gill & John.*, 342; after it was remanded to the court of chancery the complainants filed their amended and supplemental bill, in which it was alleged, by *E. S.*, *Samuel S.*, *William B.*, and *Robert S. Buchanan*, children and heirs at law of *James A. Buchanan*, and sister and brothers and heirs at law of *Eliza S. Buchanan*, complainants, that heretofore *Eliza S. B.* purchased of a certain *George Torrance*, one undivided fifth part of the *Warren Factory*, situate in this State, and its lands, mills, &c., for the sum of $60,000; and in order to secure the payment of said sum, executed and delivered to said *Torrance*, a bond dated 16th April 1829, with *J. A. B.*, *W. B.*, *E. S. B.* and *R. S. B.*, as her sureties; and the said *Torrance* at the said time, gave to the said *Eliza S. Buchanan* his bond for the conveyance of the said property, which your complainants are ready to produce, whenever this court shall require the same. That on the 1st August 1831, the said *George Torrance*, for the use of a certain *Wm. Fulford*, *Wm. Lorman* and *Alexander Lorman*, instituted an action of debt in *Baltimore* county court against *J. A. B.*, *W. B. B.*, *E. S. B.*, and *R. S. B.*, as surviving obligors of *Eliza S. Buchanan*, and thereon, on the 12th December 1832, recovered a judgment of the said court for the sum of, &c. That the said *Torrance* assigned the said bond of *E. S. B.*, and her sureties to the said *W. F.*, *W. L.*, and *A. L.*, and that they, and each and every of such assignees, well knew before, and at the time of such assignment, for what consideration, and upon what contract the said bond was given, and that it was, in fact, given for the purchase money of the said *Warren Factory*, its lands and appurtenances. That after the contract aforesaid, between the said *Eliza S. Buchanan* and the said *George Torrance*. in relation to the said *Warren Factory*, had been entered into, and while the legal title thereto still remained in him, the said *George Torrance*, to wit, on the 13th August 1830, he, the said *G. T.*, for the purpose of securing a note, endorsed, for his use, by the said *W. F.*, and discounted for the use of him, the said *G. T.*, duly executed and delivered

to him, the said *W.*, a mortgage of the said one undivided fifth part of the *Warren Factory*, to secure the payment of the said note, amounting to the sum of $11,000, and which said mortgage was made subject to the operation and effect of the bond, executed as aforesaid to the said *Eliza S. Buchanan*, all which will, &c. That afterwards, to wit, on the 7th May 1834, the said *William* and *Alexander Lorman* having taken the place of the said *William Fulford*, as endorser upon the said promissory note of *George Torrance* for $11,000, the said *William Fulford* and *George Torrance* assigned to the said *William* and *Alexander Lorman*, said mortgage of the 13th August 1830, from said *George Torrance* to *William Fulford*, and also a certain other mortgage of the 21st August 1829, herewith filed as a part of this bill for property acquired by said *Torrance*, whether from his father or mother, or both, the object of which mortgages was to secure the said debt of $11,000. That on the 30th November 1831, the said *Torrance*, for the purpose of securing another sum of $7,500, by him borrowed from the said *William* and *Alexander Lorman*, executed another mortgage to them of his undivided fifth in the said *Warren Factory* and appurtenances, also subject to his bond of conveyance, to the said *Eliza S. Buchanan*, so that in effect and fact, he, the said *George Torrance*, after his contract with the said *Eliza S. Buchanan*, and while he held the legal title to the property, the subject of that contract mortgaged and conveyed the said legal title to the said *Alexander* and *William Lorman*, to secure them the sum of $18,500, obtained by the said *George Torrance*, on his own account, or for his own uses, and in no way connected with the said factory, the consideration of the bond of the said *Eliza S. Buchanan*, or the complainants in this cause. And these complainants further allege, that after the said contract between *E. S. B.* and *G. T.*, the said premises were destroyed by fire; that the same were insured, and that the said *W.* and *A. L.*, or the said *T.*, received the amount of the insurance, or some part thereof, and they pray an answer and discovery, of the sum so received, which these defendants insist was, and is in equity in part payment of the said bond from *Eliza S. Buchanan* to said *Tor-*

rance, and must be so considered and taken, or at any rate, went to pay the debt due from the said *Torrance* to the said *William* and *Alexander Lorman*. That afterwards, to wit, on the 12th May 1835, the said *W. L.*, *A. L.* and *W. F.* filed their bill on the equity side of *Baltimore* county court, a court of full, complete and competent jurisdiction in the premises, against the said *G. T.* alone; the object of which was to sell the property, estate and effects which had theretofore been mortgaged by the said *G. T.* to the said *Lormans* and *Fulford*, as hereinbefore mentioned, for the purpose of paying the debt due to the complainants in said last mentioned bill; that to this bill the said *G. T.* immediately appeared, and voluntarily came into the said *Baltimore* county court, and confessed the said bill, and consented to a decree for the sale of the property therein referred to. That thereupon, a certain *Philip T. Dawson* and *Frederick Dawson*, and the *Warren Manufacturing Company*, claiming to be the assignees of a certain *John T. Barr*, a judgment creditor of the said *G. T.*, petitioned *Baltimore* county court to be made parties defendant to the said bill of the 12th May 1835, upon the ground, that they had a lien in virtue of the said judgment, on the property mortgaged by the said *T.* to the complainants in that cause, and that the said bill had been filed without making the petitioners parties, for the purpose of defeating such lien; and thereupon the said *Philip* and *Frederick Dawson*, and the said *Warren M. Co.*, were by order of court, on the 13th May 1835, admitted *nisi* defendants to said bill; that thereupon the said *Dawson* and the *Warren M. Co.* answered the said bill, also agreed to a sale, and that the proceeds thereof should be brought into court to abide the decision thereof. That on the 10th October 1835, a decree was passed in said cause by *Baltimore* county court, that the property in the proceedings mentioned be sold, and that upon payment of the purchase money, the trustee appointed to make such sale should convey to the purchaser or purchasers thereof, his, her, or their heirs, the property and estate to him, her, or them sold, free, clear, and discharged from all claims of the parties thereto, complainants and defendants, and those claiming by, from, or under them, or either of them; and the said

trustee was thereby ordered to bring into the said court the money arising from said sale to be distributed under the direction of *Baltimore* county court. That afterwards, to wit, on the 16th January 1836, the trustee, under the decree of the 10th October 1835, proceeded to make sale of the property, ordered to be sold thereby, and, in fact, sold the said one-fifth part of the *Warren Factory* and its appurtenances, and the title and interest of the said *G. T.* therein, for the sum of $7000, to the *Warren Manufacturing Company*, by the said *Frederick Dawson*, and sold certain other property to the amount of $10,230, to the said *William Lorman* and *Alexander Lorman*, by the name of *William Lorman & Son*. That the gross sum of such sales amounted to $17,230, and on the 26th February 1836, said sales were finally ratified and confirmed.

And now your complainants show, that instead of the proceeds of said sales being distributed in due course of law and equity, by *Baltimore* county court, according to the reservation of the decree of the 10th October 1835, and the proceeds of the property sold by *G. T.* to *E. S. B.*, applied as they should have been, to the extinguishment of the debt due by her to *T.*, on her bond of April 1839, and which he had assigned to the said *Lorman* and *Fulford*, who were merely his sureties and creditors, with notice of the equities of the said *E. S. B.*, and to that extent, to the relief of the said sureties of the said *E. S. B.*, on her bond to *T.*, and instead of applying the proceeds of the other part of said property, in payment of the debt due by said *T.* to *F.* and *L.*, and in relation to which, these complainants charge, that the said *L.* and *F.* had a prior right and lien over and before the said *Dawson* and the said *Warren M. Co.*, as assignees of *John T. Barr*, and that it ought in equity, to have been applied to the debt of the said *Torrance*, due *Lorman* and *Fulford*, and in fact, the said *William* and *Alexander Lorman*, and *Frederick* and *Philip T. Dawson*, instead of permitting the sales of the said *Torrance's* property, to be distributed according to the due course of equity intercepted the same; and on the 26th February 1836, agreed that the sum of $10,130, and no more, should be applied to the payment of the sum then due on the said mortgages, exhibited

with the bill in *Baltimore* county court, and that for the remaining balance due on said mortgage, the said *William* and *Alexander Lorman* should look to certain property of *James A. Buchanan*, in or near to the town of *Wheeling*, in the State of *Virginia*, which had been attached under a judgment assigned to said *W.* and *A. Lorman*, by *G. T.*, as a further security for said mortgage debt; and the said *P. T.* and *F. D.* agreed, that they would never, in any manner, interfere with the said property of *J. A. Buchanan*, near *Wheeling;* and it was also further agreed, that the balance of the said proceeds of sale, in the hands of said trustee, should be applied under the direction of that court, without any other or further claim whatever, being made thereto, or to any part thereof, by them, or either of them, and that the said *P.* and *F. Dawson* should hold the said balance free, clear and discharged from all and every claim thereto, by the said *William* and *Alexander Lorman*, or either of them; that upon the final audit of the said proceeds, by *Baltimore* county court, the sum of $10,130 was awarded to the said *William* and *Alexander Lorman*, and the sum of $6432.15, to the *Warren Manufacturing Company;* and that it also appears by the auditor's report in said cause, that the equity of redemption of the said *George Torrance*, remaining after the execution of his mortgages to said *W.* and *A Lorman*, had been sold to to the said *Warren M. Co.*, and said Company entitled to the balance of the proceeds after payment of said *Lorman's* debt, and that on the 26th March 1836, the said audit and distribution of the proceeds was finally ratified by *Baltimore* county court; that afterwards, the said *T.* filed his petition in *Baltimore* county court, objecting to the allowance of the said sum of $6422.15 to the *Warren M. Co.*, and thereupon, *W.* and *A. L.*, on the 9th May 1836, executed a release under seal, acknowledging to have received from *John Glenn*, the trustee, who sold the premises under the decree of October 1835, the sum of $10,130, with the interest, being in full for the amount allowed them, in the case of *L.* and *T.* and others, per auditor's report of 11th March 1836, and in consideration thereof, released the said *Glenn*, trustee, of, and from all and every action, suit, claim or demand, which could or might

properly be brought, exhibited or prosecuted against the said trustee, for or on account of the said sum of money, or the payment thereof, thereby declaring themselves fully satisfied and contented, and paid the said amount as above specified.

And your complainants are now advised, and therefore charge, that the said *W.* and *A. L.* having become the mortgagees of the property sold by the said *G. T.* to *E. S. B.* and the assignees of the bond of the said *E. S. B.*, and her sureties, for the payment of the purchase money of said property so sold, and having obtained judgment against the sureties of the said *Eliza S. B.*, and being well aware that the said *James A. Buchanan*, and the complainants in this cause, were the sureties of the said *Eliza S. B.*, and therefore interested in the application of the proceeds of the one undivided fifth part of the *Warren Factory*, to the payment of the said *T's* debt to *W.* and *A. L.*, and *F.*, to the end that the right and title of the said *G. T.*, should remain unfettered and disincumbered until the year 1839, when the principal sum of $60,000, the purchase money of the said one-fifth of *Warren* factory would be due and payable, should have been content, and it was their duty to have suffered the proceeds of the property mortgaged to them by the said *T.*, to have been distributed according to the course of equity, and that if it had been so dealt with, the debt, principal and interest, not more than $11,000, with interest from 12th May 1835, according to the bill of the said *L's*, due to them, mentioned in the said mortgages of *G. T.*, would have been fully paid, and the bond of the said *Eliza S. B.*, and her sureties, and the judgment thereon must and would have reverted to the said *G. T.*, and the sole question then between the said *E. S. B.*, and her heirs and sureties, would have been, whether, as the said *Torrance* had consented to a sale of said property upon a bill to which neither she nor these complainants were parties, he, the said *T.*, after such sale not being able to give title, and not having title, could enforce the purchase money for said one-fifth of *Warren Factory*, which these complainants are advised, and charged, that he, the said *T.*, could not; yet now so it is, that the said *W.* and *A. L.*, disregarding the rights of the said *Eliza S. B.*,

and her sureties not content to enforce their rights in a due course of law, wrongfully and injuriously entered into a special agreement with a certain *Philip* and *Frederick Dawson*, and the *Warren* factory, by which they, the *W.* and *A. L.*, relinquished voluntarily the sum of $6422.15 of the proceeds of the property, mortgaged to them as aforesaid, without the consent of the said *T.*, with the intent to make *J. A. B.*, (a mere surety of the said *E. S. B.*,) pay the same, $6422.15, while at the same time, the said *W.* and *A. L.* either knew, or ought to have known, that by the sale of the said one-fifth of the *Warren Factory*, under the decree of the 10th October 1835, the title, and certainly the possession thereof, was with another party than themselves, while they still claim to enforce said bond of April 1829, and were diligently making a case of great and serious embarrassment to the title purchased by *E. S. B.*, to the injury of your complainants, and forcing them into litigation with the purchaser, under said last mentioned decree of October 1835, in order, if at all, to procure the title purchased by her.

These complainants therefore insist, that under such circumstances that the said *W.* and *A. L.*, both in their own right, and as assignees of *W. F.*, are fully paid and satisfied, and have no color or claim in equity to proceed against the property of the said *J. A. B.*, or the securities or heirs of the said *Eliza S. B;* and they further charge, that the said *W.* and *A. L.*, have no claim, or color of claim against the said *Eliza S. B.*, or her heirs or sureties, except as assignees or mortgagees of *G. T.* aforesaid; that the said trustee, who made the sale of the 16th January 1836, did, on the 26th day of March 1836, execute a deed for said one-fifth of *Warren Factory* to the purchaser; that neither the said *W.* and *A. L.*, nor the said *G. T.*, can give title to the said *E. S. B*, her heirs or sureties, to the said one-fifth of *W. Factory*, and appurtenances; that the same has been sold, and possession thereof delivered to the purchaser thereof, under the sale of the 16th January 1836, and that the consideration of the said bond of April 1829, has in fact wholly failed, and chiefly by the fact that the said *T.*, with the knowledge of the said assignees of the said *E. S. B's*

bond, has voluntarily placed it out of his power, to make a title clear and undisputable to said one-fifth of *Warren Factory*.

And these complainants further show, that after the rendition of the judgment in *Baltimore* county court, at law, and before the filing of the bill on the equity side of *Baltimore* county court, in May 1835, to wit, in the month of June 1833, the said *G. T.*, *W. F.*, *W. L.* and *A. L.*, filed their proceedings in chancery, in the circuit superior court of law and chancery, for the county of *Ohio*, in the State of *Virginia*, for the purpose of enforcing the payment of the judgment obtained by them in *Baltimore* county court, at law, upon the bond of *E. S. B.* against her sureties, the said *J. A. B.*, *W. B. B.*, and *Esther S. B.*, and *R. S. B.*, who were not inhabitants of *Virginia*, and against *Morgan Nelson* and *Lewis Bonnett*, the debtors of *J. A. B.*, and it was so proceeded in, that in the month of November 1835, that it appearing to the court in *Virginia*, that the said *J. A. B.* hath real effects in said State, and that his personal effects therein amount to $333.33, the court adjudged, that the complainant's bills against him should be taken for confessed, and then rendered a decree against him for the sums due from him, in conformity to the judgment of *Baltimore* county court, and that *Lewis Bonnett* pay to the the complainants the sum of $333.33, with interest from 8th July 1833, until paid, and that unless the said *J. A. B.*, on or before the 10th December 1835, do pay the complainants the sum of $24,744, &c.; that the sheriff of *Ohio* county do sell, &c., a tract of 443 acres of land, in the amended bill mentioned as the property of *J. A. B.*, upon the terms prescribed in said decree, and the said cause was also further retained for proceedings against an undivided interest of *J. A. B.*, in certain other real property in the counties of *Ohio*, and *Marshall*, in the State of *Virginia*, and against the said *J. A. B.*, as to the other defendants, the said bill was dismissed; and that afterwards, on the 30th July 1836, the land in the said decree condemned, was under the said decree, put up and sold for fifteen dollars per acre to the said *William* and *Alexander Lorman*, the said *W.* and *A. L.*, having previously filed a bond, as required by the said decree, all which will more fully and at large appear upon a reference, &c.

And so your complainants charge, that after the agreement of the said *W.* and *A. L.*, of the 26th February 1836, with the said *D.* and *Warren M. Co.*, by which they, the said *Lormans*, were in equity fully paid, to wit, on the 30th July 1836, they proceeded to make sale wrongfully of the property of the said *J. A. B.*, and that the said *G. T.*, long after he had parted with his title to the said undivided fifth of *Warren Factory*, and had lost all legal and equitable control over the same, and being now, and for a long time past, utterly insolvent and wholly unable to comply with his bond of conveyance, or respond in damages for the breach thereof, is wrongfully proceeding jointly with the said *L.* and *F.*, in *Virginia*, to enforce the bond and judgment of *Baltimore* county court as aforesaid; these complainants contending, that after the consent to the said sale, by the said *Torrance*, and after the said agreement of 26th February 1836, neither he, nor the said *Lormans*, had any power or right further to proceed in the recovery of the said bond of *E. S. B.*, and her sureties; that the said *Eliza S. B.* died sole and intestate, and left her father, *J. A. B.*, and her brothers and sisters, *W. B. B.*, *Esther S. B.*, *R. B.* and *S. S. B.*, her heirs at law; that *J. A. B.* is also dead, and left the said children, his heirs at law; that the same are all citizens of *Maryland*, but the said *J. A. B.* devised his whole estate to his son, *S. S. B.* aforesaid; that *W. F.* is dead, and a certain *H. F.* was appointed his executor, and took upon himself the burthen of that trust; that *G. T.*, *W.* and *A. L.*, are all inhabitants of *Maryland;* that *Lewis Bonnett* lives in *Virginia*, and is not a resident of this State. And finally, these complainants are so advised, and therefore insist and charge, that the said *G. T.*, for his own account, and for considerations moving unto himself, without the consent of the said *Eliza S. B.*, her securities or co-obligors, in her aforesaid bond, or her heirs at law, did divest himself of all legal and equitable title to the said one-fifth part of *Warren Factory*, its lands, &c., and did and has placed himself in a situation, and the said *W. F.*, *A. L.* and *W. L.*, have also placed themselves in a situation, whereby neither they, nor either of them can convey title to the said part of *Warren Factory*, sold as aforesaid, or its

appurtenances, or any part thereof, to the said *Eliza S. B.*, her co-obligors or heirs at law; and so that the consideration for which the said bond of April 1829, was given, and the judgment thereon was confessed has wholly and entirely failed. That no administration has been taken out upon the personal estate of *Eliza S. B.;* that in fact she left no effects; that *J. A. B.*, in the year 1834, became and was a petitioner for relief under the insolvent laws of *Maryland*, and that the said *S. S. B.* was duly appointed his permanent trustee, and gave bond as such, with security, for the faithful performance of that trust, which was duly and regularly approved. That this application for relief of *J. A. B.* was had and made before the said defendants, or any of them, had obtained any process against, or any lien, judicial or otherwise, to affect the lands, or the title to lands or real estate of the said *J. A. B.*, in *Virginia*, and that the time, course, and manner of the said proceedings in *Virginia*, by and on behalf of the defendants in this cause, will fully and particularly appear by the record above referred to. That the said proceedings in *Virginia* are in effect, an attempt to prevent the just and legal distribution of the property of an insolvent debtor, an inhabitant and citizen of *Maryland*, by other citizens of *Maryland*, bound to respect the laws of this State, and liable to be restrained for any violation thereof, and are, in law, against the policy of our insolvent laws. Prayer, that the sale of the said one-fifth part of the *Warren Factory*, its lands, &c., made by the said *George Torrance* to *Eliza S. Buchanan*, may be vacated and annulled; that the said bond of the said *Eliza S. Buchanan*, and her sureties aforesaid, of April 1829, may be vacated; that the plaintiffs at law may be perpetually enjoined from enforcing the judgment of *Baltimore* county court upon the said bond, and that the same may be entered satisfied or stayed, and that the said *G. T.*, *A. L.* and *W. L.*, and *W. F.*, may also be perpetually enjoined from further proceeding upon their decree in the circuit superior court of law and chancery for the county of *Ohio*, in the State of *Virginia;* that the sale reported in said cause of *James A. Buchanan's* land may be vacated, and the said *W.* and *A. L.* be enjoined from receiving a conveyance for said land, or in any manner

alienating or disposing of the same, or that the said *W.* and *A.* may be decreed to hold the same in trust for the heirs of the said *J. A. B.*, or his assigns; and they pray, further, for such other and general relief as the nature of their allegations, proof and equitable rights shall and may sanction; and for process, &c.

The answer of *Alexander Lorman* admitted that *Eliza S. Buchanan* purchased of a certain *G. T.* one undivided fifth part of the *Warren Factory*, &c., for the sum of $60,000, as stated in said bill; and that in order to secure the payment of the said sum, she executed the bond, of which a copy is exhibited, with the original, bill in this cause. He further admits, that on the 1st August 1831, the said *G. T.*, for the use of *W. F.*, *W. L.*, and this defendant, instituted an action of debt in *Baltimore* county court against *James A. Buchanan*, &c., surviving obligors of *Eliza S. Buchanan;* and that on the 12th December 1832, the said *G. T.* obtained, by confession, a judgment of the said court for, &c. That the said *G. T.* assigned the said bond of the said *E. S. B.* and her sureties to the said *W. F.*, *W. L.*, and this defendant, and that the said assignees, and each of them knew, before and at the time of such assignment, that the said bond of the said *E. S. B.*, and her sureties, was given to secure the payment of the purchase money contracted by her to be paid for the said one undivided fifth part of the said *Warren Factory*, its lands and appurtenances. And this defendant denies that the bond of conveyance, given by said *G. T.*, was given to the said *E. S. B.* on the day of the date of her bond for the payment of the purchase money hereinbefore referred to, but avers, that the said bond of conveyance from the said *G. T.* to the said *E. S. B.*, bears date the 20th April 1829, and was delivered on that day. And this defendant alleges, that the said *E. S. B.*, and her sureties, made default in the payment of the sum of, &c.; and that on the 21st August 1829, the said *G. T.* executed to *W. F.*, in the State of *Maryland*, a deed of mortgage, filed with the bill in this cause, and that thereafter, the said *E. S. B.*, and her sureties, further made default in the payment of the sum of, &c., so that the said *G. T.*, on the 13th August 1830, with a view

to the further security of the said *W. F.*, executed the second mortgage, exhibited with the bill in this cause, which said mortgage, as this defendant admits, was made subject to the operation and effect of the bond of conveyance, executed as hereinbefore stated, on the 20th April 1829, by the said *G. T.* to the said *E. S. B.*, and which mortgage was intended to operate, and did operate, merely as a transfer of the debt then due upon the bond aforesaid, of the said *E. S. B.* and her sureties. And this defendant further answering, admits, that on the 30th November 1830, when the amount of the instalments, required by the bond of his said *E. S. B.* to be paid, and which had fallen due since the mortgage to *W. F*, as aforesaid, was $4500, the said *G. T.* with the knowledge and assent of the said *W. F.*, executed a mortgage to *W. L.* and this defendant, of the said one undivided fifth part of the said *Warren Factory*; and which mortgage was intended to operate, and did operate, merely as a transfer of the debt which had become due on the said bond of the said *E. S. B.* and her sureties, since the 13th August, in the year 1830, the date of the mortgage so as aforesaid made to *W. F.* And this defendant further answering, admits, that on the 7th May 1834, *W. F.* and *G. T.* executed to *W. L.* and this defendant, the indenture of assignment, filed with the bill in this cause, and he admits that the said mortgage of the 30th November 1831, and the said indenture of assignment of the 7th May 1834, were made and accepted, subject to all rights which the said *E. S. B.* had acquired under the bond of conveyance hereinbefore referred to. That the said *G. T.* received the sum of $8949.20, on account of a policy of insurance effected by him on his insurable interest in the said one undivided fifth part of the said *Warren Factory*, and that the same was duly paid over by the said *G. T.* to the said *W. L.* and this defendant, on account of their claim against him; and this defendant denies that the said policy of insurance was intended to cover, and did cover, any interest of the said *E. S. B.* in the insured premises; and he denies that the sum so received on account of the policy aforesaid, or any part thereof, was or is applicable to the payment of the said bond of the said *E. S.*

B. and her sureties. That on the 12th May 1835, the said *W. L.* and this defendant, as complainants, filed their bill in *Baltimore* county court, sitting as a court of equity, against the said *G. T.*, for the purpose of compelling payment of the balance of $11,000, then due to the said *W. L.* and this defendant, by the said *G. T.*, after duly crediting him with the sum received by them of him, as aforesaid, on account of the policy of insurance hereinbefore referred to. That in the course of the proceedings on said bill, a certain *Philip T. Dawson* and *Frederick Dawson*, and the *Warren Manufacturing Company*, by their petition and the order of *Baltimore* county court, passed thereupon, were permitted to appear as defendants to the said bill, and filed their answer as defendants in the said cause, and thereafter filed their consent to the decree, which was rendered by *Baltimore* county court on the 10th October 1835, as will more fully appear by the said decree, being part of complainant's bill in this cause.

And this defendant further admits, that the proceeds of the sales, made in pursuance of the said decree, amounted to the sum of $17,230, of which the sum of $10,130 was, by agreement of the parties, dated the 26th February 1836, audited to *W. Lorman* and this defendant, and the sum of $6422.15 was awarded to the *Warren Manufacturing Company;* and he admits, that for the balance remaining due on the said mortgages, after the credit of the said sum of, &c., the said *W. L.* and this defendant, by the agreement aforesaid, were to look to certain property of *James A. Buchanan*, at or near *Wheeling*, in the State of *Virginia*, for which property as their security, exclusive of any claim of the said *Philip T. Dawson* and *Frederick Dawson*, they had agreed to pay, and have paid the said *Philip T. Dawson* and *Frederick Dawson*, the sum of $1000; that the said *W. L.* and this defendant, received from *John Glenn*, the trustee appointed in and by said decree, the aforesaid sum, and have duly executed to him their release therefor, as charged in said bill; that on the 26th February 1836, the date of the agreement aforesaid, made in the cause in *Baltimore* county court, as a court of equity hereinbefore mentioned, several instalments of the bond of the said *E. S.*

B., and her sureties as aforesaid, had become due and payable since the 30th November 1831, amounting altogether to the sum of $15,300, which this defendant insists, that the said *W. L.*, this defendant, and the said *G. T.*, were entitled to receive in like manner as the instalments due before that period, the said *W. L.* and this defendant, to the extent of their interest in the said instalments, as security for the debt due to them by the said *G. T.*, and the said *G. T.* the balance; that after the rendition of the judgment in *Baltimore* county court hereinbefore mentioned, and before the filing of the bill on the equity side of *Baltimore* county court as aforesaid, to wit, in the month of June, in the year 1833, the said *G. T.*, *W. F.*, *W. L.* and this defendant, filed their bill in chancery in the circuit superior court of law and chancery for the county of *Ohio*, in the State of *Virginia*, as set forth in the complainant's bill, and he admits exhibit, &c., to be a copy of the record of the proceedings of the said circuit superior court upon the bill so filed; and this defendant avers and insists, that the orders and decrees of the said circuit superior court of law and chancery, set forth in said record, still remain in full force and effect, not in any wise reversed, annulled, set aside or rendered void, and this defendant accordingly claims the benefit thereof; that the said *E. S. B.* died sole and intestate, and left her father, *J. A. B.*, her brothers, *W. B. B.*, *&c.*, surviving her; and he further admits, that *J. A. B.* has departed this life, and that he left the following children, his heirs at law, *W. B. B.*, *&c.*, but this defendant does not know whether all of his said children be citizens of this State or not, nor does this defendant know whether the said *J. A. B.* devised all his estate to the said *S. S. B.*, as stated in said bill; that the said *W. F.* is dead, and that a certain *H. F.* was appointed his executor, and took upon himself the burden of that trust, but he states that the said *H. F.* has since departed this life, and that the father of this defendant, *W. L.*, is also dead; that no administration has been taken out on the personal estate of *E. S. B.*, but this defendant does not know whether she left no effects, as stated in said bill; and he further admits, that the said *J. A. B.*, on the 11th December 1834, made application for the benefit of the insolvent laws of

Maryland, and that the said *S. S. B.* was duly appointed his permanent trustee, and gave bond as such. And this defendant denies, that the said proceedings in *Virginia*, were intended to prevent the just and legal distribution of the property of the said *J. A. B.*, as charged in said bill; but to the contrary thereof, he insists, were duly and rightfully instituted and prosecuted, and that he is entitled to the full benefit thereof, without this, &c.

The answer of *George Torrance* adopted that of his co-defendant, *Alexander Lorman*.

It was admitted, that neither *William Fulford*, nor *Henry Fulford*, nor their heirs, have any interest in the cause, their interest having been transferred, and their liability for *Torrance* having been assumed by *A.* and *W. Lorman;* that *Alexander Lorman* is the only child, surviving partner, and heir at law of *William Lorman*, deceased, and succeeds to whatever right or interest the said *William Lorman* had, in the subject matter or controversy in this cause, and is the administrator of the said *William Lorman*.

The various exhibits and documents, (except the bond for the purchase money,) referred to in the bill, were filed with it.

On the 28th November 1843, the Chancellor, (Bland,) dismissed the bill, being of opinion that under the facts and circumstances of the case, the complainants were not entitled to relief.

The complainants appealed.

The cause was argued before Archer, C. J., Spence and Martin, J.

By Glenn for the appellant, who contended, that the decree below was erroneous:

1st. Because the case was decided the other way, upon the former appeal.

2nd. Because the vendor, *Torrance*, by his own acts, put it out of his power to give *E. S. Buchanan*, his vendee, a title to the property, and caused a total failure of consideration.

3rd. Because the agreement of *Lorman* and others, the appellees, in relation to the rights, if they had any, against *Eliza S. Buchanan*, deprives them of the right to pursue the other parties.

He maintained, that the *Dawsons* did not purchase to hold under *Miss Buchanan*, nor with knowledge of her title, but adversely to her; and hence there was a total failure of consideration as to *Miss B.* If the purchaser is evicted before title made, he may recover back the purchase money, 2 *Sug.*, 279, 420, though once in possession. *Cripps vs. Reade*, 6 *Term. Rep.*, 606. *Johnson vs. Johnson*, 3 *Boss & Pull*, 162.

The vendor cannot demand specific performance, unless he can convey, or unless he can do all that it is incumbent on him to do. *Garnett vs. Macon*, 6 *Call's Rep.* 368. Here the purchasers were entitled to a deed in 1839, and then only could they require title, yet, in 1839 it was gone, past recovery. There could be *no quid pro quo* for mean, while the vendor had designedly disposed of it to another. We are entitled to a clear title, or to rescind the contract. *Frisbee vs. Hoffnagle*, 11 *John.*, 50. *McKay vs. Carrington*, 1 *McLean*, 50. *Duplantier vs. Pigman*, 1 *Con. Louis'a*, 116. 3 *Martin* 236. Danger of eviction is enough for equitable interference. There was an express contract, and the complainants are sureties. The property was diverted to their detriment.

All the sureties are injured. By the contract of the defendants the sales were paid to *Dawson*, in extinguishment of liens due from *Torrance*. A new bargain is struck in opposition to the securities, and it took from them property on which they might properly rely.

David Stewart, for the appellees, in support of the decree insisted:

1. That the purchaser, under the decree of *Baltimore* county court, if in truth he acquired any interest in the premises attempted to be sold, purchased the same with notice of the agreement between *Torrance* and *Eliza S. Buchanan*, and took subject to the equities of the latter arising out of that agreement. The heirs of the latter may, therefore, enforce a

specific execution of the agreement as against the purchaser under the decree, on paying the balance of the purchase money due on the agreement to the persons entitled thereto.

2. That the mortgages from *Torrance* to *Fulford* and *Lorman*, under which the sale was professedly made, assigned merely parcels of the purchase money due from *Eliza S. Buchanan* to *Torrance*, on the agreement between them, as indemnities to the said assignees against liabilities they had assumed for *Torrance*, with the benefit of the vendor's lien on the property sold by *Torrance* to *Eliza S. Buchanan*.

3. That the sale made under the decree of *Baltimore* county court could, therefore, operate only as an assignment of so much of the purchase money due from *Eliza S. Buchanan* to *Torrance*, as was equivalent in value to the proceeds of sale made under the decree, or at the extent to the balance due on the mortgages, for satisfaction of which the sale was made. The right to demand payment of the residue of the original purchase money yet exists in *Torrance*, or *Lorman* as his assignee of the judgment stated in the proceedings.

4. That if the agreement is to be rescinded at all, it ought to be upon the equitable conditions of payment by the complainants, as representatives of the purchaser, of interest on the purchase money, during the time the possession of the premises remained in the hands of the original purchaser, and an equivalent in value for deterioration of the property during the continuance of such possession.

5. That the decree in *Virginia* was an appropriation of the property decreed to be sold in payment of this debt, and the vendor is entitled to the benefit of this decree, since the value of the property so appropriated, together with the proceeds of sales subsequently made, are not equal to the balance of purchase money yet due.

E. S. B bargained with her partner and co-shareholder, *Torrance*, and so became sole proprietor of the *Warren Factory*. Upon that purchase she was in default $19,344, at the time of the judgment on the bond, which was payable by instalments. The property was mortgaged subject to her contract, and it was assigned to *Lorman*, liable to the same incumbrance.

There was no original inherent defect in the title of *Torrance*. It was free from all exception, and the mortgage gave notice of *Buchanan's* equities. The proceedings in equity by *Lorman*, were not against *Buchanan*. A purchaser may presume the court has investigated the title of parties, *Bennett vs. Hamill*, 2 *Sch. & Lef.*, 577, and there is no right to question a sale from a title not in issue, nor in any way affected by the decree, *Haines et al. vs. Beach*, 3 *J. C. R.*, 459. The court makes no warranty. It is only the title of parties which is sold. The purchaser only takes that. *Brown vs. Wallace & Mitchell*, 4 *G & J.*, 492. *Miss B.* was not affected by that sale, it only transferred the vendor's lien. The purchaser might be forced, by *Miss B.*, to transfer the title to her, A purchaser, with notice, is bound by the agreement, and must perform it. On the question of notice, he cited *Ghiselin and W. vs. Fergusson*, 4 *H. & J.*, 522. *Champion vs. Brown*, 6 *J. C. R.*, 398. *Graves vs. Graves*, 1 *A. K. Marshall*, 165. *Broadwell vs. King*, 3 *B. Munroe*, 451. *Wadsworth vs. Windell*, 5 *J. C. R.*, 224, 229. The mortgage to *Lorman*, in terms, gave notice of *E. S. B's* right. The advertisement of sale gave it; the deed of the trustee so conveyed.

On the fourth point he insisted, that the parties to the original purchase must be placed in *statue quo*, and on this point he cited *Bullock vs. Bemiss*, 1 *A K. Marsh.*, 433. *Brockenbrough and Taylor vs. Blythe's Ex'rs*, 3 *Leigh.*, 619. *Williams vs. Rogers*, 2 *Dana.*, 375. *Turner vs. Clay*, 3 *Bibb*, 53. *Bumpus vs. Platner*, 1 *J. C. R.*, 213. *Taylor vs. Lyon*, 2 *Dana*, 276.

On the fifth point he maintained, that the *Virginia* decree established the debt, and there was no ground to disturb that decree when it passed. *Story Confl. of Laws*, 278, 362. *Buchanan's* discharge under the insolvent law of *Maryland*, had no extra territorial effect. The obligee had a right to sell *Miss B's* bond, as much as any other part of his estate. It was not to be dormant in his hands, and unavailable, and hence proceedings to enforce it are not to be disturbed.

T. S. ALEXANDER, for the appellees.

The first point of the appellants is out of this case. Their third point relies on a mistake in the application of the fund arising from the sales of the *Warren Factory* under a decree, which is no ground of complaint against the decree itself. If they seek the application of that fund to themselves, they admit the validity of the decree. The law of the *second* point of the appellant is denied.

What is the justice of this case, the morality of this bill? *Torrance's* title is not questioned. He sold his interest, one-fifth of the factory, to *Miss B.*, on ten years credit, payable by instalments, and put her in possession. She relinquished to the purchaser under *Lorman's* decree in 1836. She paid nothing for use and occupation, nor for interest, and the factory now is valueless. Her representatives propose to sponge off the price and interest, and return the property in a dilapidated condition. If they had proposed to pay for use and occupation, there might be something in it. Then as to the pretext for setting aside the sale: they say, we cannot give them the thing we contracted to give them. Then, how stands the case. *Torrance*, a creditor for $60,000, with a lien on the property, makes a public sale, and discloses his contracts. All the mortgages disclose his right. He practices no injustice. *Lorman* sells his title, such as he had, no more, it is subject to *Miss Buchanan's* contract. The purchaser is affected with notice of all that appears in the record of the cause, in which the decree for a sale was obtained.

It is not true that the property was placed beyond *Miss B's* reach. She refuses to pay the purchase money; refuses to pay the assignee of her bond. *Lorman* seeks his right; he falls upon an unskilful attorney, who instead of proceeding by execution on the judgment at law, in *Baltimore* county court, files a bill, and the vendee improperly surrenders the possession, under a decree to which she was no party. This surrender is now wielded as a defence to her contract of purchase; is in fraud of it.

Then can the contract be rescinded? *Torrance's* title was originally good, a supervening defect is now relied on to defeat

it Can *Miss B.* get a legal title? The vendor is a trustee for the vendee; a purchaser from vendor is a trustee with notice, and must execute the trust. *Lorman* might have sought a foreclosure, and cut off *Torrance*. But he takes a decree for a sale. He sells. Does the purchaser take any better title than *Lorman* had? Not at all. *Miss B* had a right to demand a title on payment. Then who is entitled to the balance of the purchase money. The delinquent purchaser should only be indemnified. The bill does not shew who is entitled to the purchase money. *Lorman* purchased a debt from *Dawson*, who bought the estate, and it would be a fraud on *Dawson* to claim the whole estate. The vendor may extinguish his lien, and still claim the purchase money *Aymar vs. Bill*, 5 *John. C. R.*, 570. *Turner vs. Clay*, 3 *Bibb*, 353. 4 *Dessau*, 126.

On the appellees fourth point: Upon what terms may the contract be rescinded? The parties must be reinstated; *Torrance* is entitled to his land: to something for dilapidation. It was a flourishing manufactory when sold. To put us back in 1845, will not repay us. The property should be restored to its original condition. It is like a covenant to repair or to rebuild There must be compensation for seven years use of the estate. There was no actual fraud, and *Miss B.* must respond as tenant in possession. *Frisba vs. Hoffnagle*, 11 *John.*, 50. *McCay vs. Carrington*, 1 *McLean*, 61 *Garnett vs. Macon*, 6 *Call*, 368.

As to the *Virginia* decree, it is conclusive, it is in *rem.*, if no defence could be maintained to it in *Virginia*, none could be here.

By Reverdy Johnson, in reply:

On the former appeal, *Buchanan vs. Torrance*, 11 *G. & J.*, 342, only two objections were taken, and it was remanded to cure those defects. The equity of the case was not denied, and upon this appeal, the general principles involved since the defects of the first were cured, are not changed. *Torrance* consented to a decree for a sale, and *Dawson* bought clear of all the parties to the cause, and all persons claiming under them.

The purchaser took free of *Torrance's* title, took an absolute title, and then came the agreement to divide the proceeds, irrespective of these complainants. The court, in the former case, under the act of 1832, ch. 302, sect. 6, necessarily assumed, that the sale to *Miss B.* ought to be rescinded, or they would not have remanded the cause. That act required them to look at the justice of the case, and no relief could be granted, without determining that the sale should be rescinded. That is not now an open question.

The surety of the purchaser cannot be made to pay where there is a failure of consideration. The rule of equity cannot be denied as to an entire failure. *Garnett vs. Macon*, 6 *Call.*, 367, 368.

A vendor calling for specific performance, must be able to grant such an estate as he agreed to give. What is the cloud over the title here? We cannot demand title until 1839, nor he demand the principal of the purchase money. At the time stipulated for compliance, the vendor must be able to comply. How is this objection met? What will the purchaser, under *Torrance's* decree, say to us? I have bought out all his interest in the land. In 1835, he had the legal title, it was sold, and *Torrance*, could not comply with his bond to convey. Can this defendant answer us by saying, we may get the title from the purchaser, under the decree, or that possibly or probably, we may get it. Will *Torrance's* deed give a full title? Who is to decide that? Will the purchaser do it favorably to us? No. He will say he will not, and may rely on his decree. He may rely on the presumptions of the decree. This court cannot disturb his possession, without a bill. We might, perchance, recover it. Then is a vendee to pay for land, which he must go into equity against strangers, to compel a title to be given to him, after he has parted with his money? To relieve us from this difficulty, *Lorman* should have made these complainants parties, as *Torrance's* vendee, but that bill disregards us altogether. As respects *Torrance*, the property is gone, and that entitles us to satisfaction of the judgment at law.

Then, what does equity impose on us? It is said, account for rents and profits. It must appear, that the vendee has, or

might have received them. Possession of the estate is not stated in the bill in answer. Defects in answers are not cured by the act of 1832, ch. 302. No averment in answer of receipts of profits. If we are to account, how are we to account? The vendee here, is not to account for interest, but if for any thing, only for what he has made. This is a principle of justice. It was a ruinous concern. There can be no claim for interest where the debt is gone. The cause cannot be remanded twice to make a better case. There is no proof of dilapidation. Difference in price, is no proof of bad management. The possession is gone, which is the fault of the vendor.

As to the proceedings in *Virginia*, we are entitled to have the judgment at law entered satisfied, and the sale rescinded. The defence was not disclosed to the *Virginia* court. *E. S. Buchanan* not a party there. Then as the party claiming the *Virginia* land resides in *Maryland*, his conscience may be affected here. No jurisdiction over the land, but there is full, over his person. Where a personal remedy may be decreed, or the subject matter is here, this court may act. *Lorman* is in no better situation than *Torrance*. If against equity to take *B's Maryland* lands, it is equally so to take his *Virginia* estate. Having lost the remedy in *Maryland* against the vendee, his sureties cannot be pursued in *Virginia*.

Archer, C. J., delivered the opinion of this court.

The complainants seek to vacate a sale made by *George Torrance* to *Eliza S. Buchanan*, of one undivided fifth part of the *Warren Factory*, on the 16th day of April 1829, on which day she executed her bond for the purchase money, and to enjoin the defendants from proceeding to collect the amount of the purchase money. Suit having been instituted in *Baltimore* county court on this bond, judgment was confessed by the defendants on the 12th of December 1832, and proceedings having been instituted in the superior court for the county of *Ohio*, in the State of *Virginia*, as a court of equity, to subject certain funds and lands of the obligors in the bond to sale for the payment of the said judgment, and a decree having passed thereon, and certain portions of the property

having been sold, the bill further prays, that the defendants may be enjoined from further proceeding upon their decree in the superior court of chancery, for the county of *Ohio*, in the State of *Virginia*, that the sale reported in said cause of *James Buchanan's* land may be vacated, and the said *William* and *Alexander Lorman* enjoined from receiving a conveyance for said land, or in any manner alienating or disposing of the same; or that the said *William* and *Alexander Lorman* may be decreed to hold the same in trust for the heirs of *James A. Buchanan*, or his assigns, and for general relief.

It appears, from the bill, answer and exhibits, in the case, that after the contract of sale made by *Torrance* to *Eliza Buchanan*, that *Torrance*, on 13th of August 1830, mortgaged his interest in the property sold to *William Fulford*, to indemnify him as endorser for *Torrance* to the extent of $11,000, and on the 30th of November 1831, he mortgaged the same property to *William* and *Alexander Lorman*, to secure the payment of $7500. These mortgages, on their face, were declared to be subject to the operation and effect of, as well a bond executed by *Torrance* to *Eliza Buchanan*, on 20th April 1829, for the conveyance to her upon the terms therein expressed of the aforesaid one undivided fifth of the *Warren Factory*, as of a mortgage of said interest, in connexion with other property executed by *Torrance* to *Fulford*, on 13th of August 1830. On the 17th of May 1834, *William Fulford* and *George Torrance* executed an assignment of the mortgage of the 13th of August 1830, to *W.* and *A. Lorman*. On the 12th of May 1835, *W.* and *A. Lorman* filed their bill in *Baltimore* county court against *George Torrance* for a foreclosure and sale of the property thus mortgaged. To this bill *Eliza Buchanan* was not made a party, but the defendant, *Torrance*, voluntarily appeared, confessed the facts in the bill, and consented to a decree. On the 10th of October, *Baltimore* county court decreed a sale. On the 28th of January 1836, the trustee appointed to sell the mortgaged premises reported the sale to the court, and the same was, by the court, on the 26th of February 1836, finally ratified and confirmed. On the 1st of July 1836, *John Glenn*, the trustee, in pursuance of the decree

conveyed to the purchaser the one undivided fifth of the *Warren Factory*, thus sold to the purchaser.

Anterior to the above decree in *Baltimore* county court, *P. F. Dawson*, *F. Dawson*, and the *Warren Manufacturing Company*, alleging that *John T. Barr* had recovered a judgment against *George Torrance*, which was assigned to them, prayed to be, and were, by the court, made parties; and in their answer to the bill of *W.* and *F. Lorman*, allege, that the complainants have other securities for their debt, consent to a sale, and pray that the money may be brought into court to abide the decision of the court. The proceeds of sale amounting to $17,230, were distributed, $10,130, to *W.* and *A. Lorman;* to the *Warren Factory*, $6422.15, by an agreement between *W.* and *A. Lorman*, and *P. F. Dawson* and *F. Dawson*, filed on the 11th March 1836. By this agreement no more than $10,130 was to be applied to the payment of the mortgages exhibited in the cause; and it was agreed, that for the remaining balance due on said mortgages, *W.* and *A. Lorman* were to look to certain property of *James A. Buchanan*, in or near the town of *Wheeling*, which had been attached, &c.; and in consideration of $1000, *P. F.* and *F. Dawson* agree, that they will never interfere with *Buchanan's* property in *Viringia*, and *W.* and *A. Lorman* agree, that the balance of the proceeds of sale shall be paid to *P. F.* and *W. Dawson*.

Anterior to these proceedings in *Baltimore* county court, as a court of equity, to wit, on the 12th of December 1832, *Torrance*, for the use of *Fulford*, *W.* and *A. Lorman*, had obtained a judgment in *Baltimore* county court against the securities of *Eliza Buchanan*, who had survived her, for the purchase money. And, also, anterior to said proceedings in *Baltimore* county court, as a court of equity, *George Torrance*, *W.* and *A. Lorman*, and *W. Fulford* filed their bill in the superior court of law and equity for *Ohio* county, in the State of *Virginia*, against the securities of *Eliza Buchanan*, on her bond for the purchase money, alleging the execution of the bond, the judgment in *Baltimore* county court, that it was paid, and praying to subject the lands of *J. A. Buchanan* to sale, for

the payment of the said debt; and that funds in the hands of certain debtors of the said *J. A Buchanan* should also be condemned for the payment of the said judgment. On the 6th of November 1835, the superior court for the county of *Ohio* decreed, that *James A. Buchanan* should pay to the complainants in that proceeding, on a day named, the sum of $24,744, with legal interest until paid, and costs, the said sum being the amount then found to be due on the bond of *Eliza Buchanan*, that a certain tract of land in the bill mentioned should be sold to pay the amount decreed, unless within the time specified, the said amount should be paid, and that the debtors of *James A. Buchanan*, who had been made parties, should pay to the complainants the sums in their hands belonging to him, and that as to the residue of the lands mentioned in the proceedings, the bill should be retained for future decree; and as to the other defendants, the bill was dismissed. A sale under the decree was accordingly effected on the 30th day of July 1836, and the said *William* and *Alexander Lorman* became the purchasers. No further proceedings appear to have taken place in the *Virginia* court in the above case.

The complainants insist, that *Torrance*, by his acts, since the contract of purchase and sale, has disabled himself from complying with his contract, in making a title to his vendee, and that as by such acts the consideration upon which the bond has been given has failed, the contract of sale should be rescinded, and that the judgment obtained upon the bond given for the purchase money should be perpetually enjoined.

A vendee of an estate, in an unexecuted contract, is entitled to have that for which he contracts before he can be compelled to part with the consideration he agreed to pay. The ability of the vendor to convey should exist, when his duty, by the contract, arises to convey, or at the time of a decree for a conveyance, where time is not of the essence of the contract. And we conceive it to be equally clear, that a vendee is not bound to take an estate fettered with incumbrances, by which he may be subjected to litigation to procure his title. These principles are so obviously just, that they must be considered as resting at the foundation of every well regulated system of equity.

The admissions and facts in the cause show, that mortgages were, after the contract of sale, executed to secure to the mortgagees the payment of $18,500; that a bill was filed to sell the mortgaged premises to pay the mortgagees, and that a decree passed to sell the same, and the trustee was directed by the decree to convey to the purchaser the right of the mortgagor and mortgagees, which was executed by a sale in January 1836, and a deed accordingly executed to the purchaser in July 1836; in strict conformity with the terms of the decree. To this decree the vendor voluntarily consented, and assented to part with his title There can be no doubt but that this decree and sale operated to extinguish the vendor's title, and to pass it to the purchaser. The argument which has been urged, that these mortgages and this decree only operated to pass so much of the purchase money due to *Torrance* as these mortgages called for, cannot be sustained, because, by the deeds themselves, the legal title passed to the mortgagees, and the mortgagees do not seek to subject to sale so much of the debt due to *Torrance* from *Eliza Buchanan* as would extinguish the mortgages, but they ask that the land mortgaged shall be sold to pay the amount of their lien, and the decree follows the prayer of the bill, and the assent given by the answer of *Torrance*, and directs the land to be sold, and all the rights of the complainant and defendant to be conveyed, upon a compliance with the terms of sale to the purchaser.

It thus appears, that when the contract of sale had ripened into maturity, *Torrance*, the vendor, by his own consent, as evinced by his acts, and by his answer to the bill in equity, had stripped himself of every vestige of title, legal or equitable, in the land he had sold, and was, himself, in consequence of these proceedings, in no condition to comply with his contract to convey, and had no legal capacity to enforce a re-conveyance of the title to him, so that he might comply with his contract.

It is true, that *Eliza Buchanan* was no party to these proceedings, and was, therefore, in no manner bound by them; and that she might, perhaps, have been competent, by applying as much of the purchase money as would have fully indemnified the purchaser, on the institution of proceedings in

chancery have coerced a conveyance upon the ground, that the mortgages were originally made subject to her contract of purchase, and that the purchaser under the decree in the county court took his title with notice of this condition and agreement. But although this may be so, it by no means relieves the case from the difficulties which surround it. For *Eliza Buchanan*, the vendee, was in no manner bound to take a title thus embarrassed, and to embark in a lawsuit against an adversary claimant, to obtain that, by delay, by perhaps expensive and protracted litigation, which, by the principles of law applicable to her contract, she had stipulated to have without delay, and without expense or litigation.

It has been argued that the complainants could, at all events, be only entitled to relief by averring a readiness to comply on the part of the vendee. If the vendee had gone into equity to compel a specific execution of the contract, she must have averred a compliance, on her part, with the terms of the contract, or to have offered to pay the purchase money. But this bill seeks a rescission of the contract, on the ground of a want of title, and a payment, or offer to pay, was unnecessary. To have paid the purchase money could not have strengthened the equity of the complainant. "Chancery requires no act to be done in vain: it therefore, could not require the payment of the purchase money in this case, or an offer to pay it after the defects in the title had become known," *McLean, R.* 86.

The case of *Hart and Blight*, 3 *Monroe*, 273, has been cited by the appellees as a case analogous to this. But it will be found, from an examination of that case, that the vendor, at the time when the conveyance was to have been made, was in a condition to comply with his contract, and had, for a year afterwards, his title unembarrassed. It was the fault of the vendee that he had not, by paying the purchase money, put himself in a condition to demand a specific execution of the contract; and having been in default in complying with his contract, but for which he could have had a conveyance, it was conceived that he was not entitled to enjoin the collection of the purchase money, and that he should be driven to his remedy against the vendor, or against the purchaser under the judgment.

But in the case before us, long before the stipulated time for the completion of the payments of the purchase money, and more than three years before the vendee could have called for the conveyance of the title, the vendor had parted with his title, and was utterly unable to comply with his contract to convey the land.

If we are correct in the above views, the consideration for the contract having wholly failed, *Torrance,* or his assignees, who stand in his stead, ought not to be allowed to recover the purchase money for the land sold, and as the judgment in the county court, sought to be stayed, was obtained on the bond for the purchase money, the defendants ought to be perpetually enjoined from instituting any proceedings to enforce its payment

The complainants conceiving that a perpetual injunction on the judgment obtained in *Baltimore* county court would furnish them with inadequate relief, if the defendants were permitted to reap the fruits of a decree, obtained against *James A. Buchanan*, seek further to enjoin them from proceeding to execute the decree obtained in November 1835, in the superior court of law and equity for *Ohio* county in the State of *Virginia.*

At the time of this decree, an equity existed on the part of the present complainants, to relief. The property sold was then encumbered with the mortgages to *Fulford* and *W.* and *A. Lorman;* the bill of the mortgagees had been filed in *Baltimore* county court, and a decree had been obtained to sell the mortgaged premises with the consent of *Torrance,* to satisfy these liens. Had these defences, which then all existed, been brought by way of defence to the notice of the court of equity in *Virginia*, we are bound to believe, that no decree would or could have passed against *James A. Buchanan,* until the estate sold should have been relieved from its embarrassments; and until the vendor, by so doing, could have shown himself in a condition to have passed the title to the vendee or her representatives.

That the court in *Virginia* possessed jurisdiction of the case decreed upon by them, has not been, and could not be denied. The decree must be considered as conclusive, as to the merits

upon the equities existing anterior to the decree, and as having all the efficacy of a domestic judgment or decree, and it could not there be examinable upon any ground of equity existing prior to the decree; and as it could not, upon such ground, be examinable in *Virginia*, we are legally incompetent to examine it here. But if an equity has arisen subsequent to the decree, which would make it inequitable in the defendants to enforce that decree upon such new and subsequent ground of equity, not existing at the time of the decree, the law, as we apprehend, would fully justify the complainants in demanding the interposition of this court, in restraining the defendants from enforcing the decree.

When the decree in *Virginia* was passed in Nov. 1835, the period had not arrived, when by the terms of the contract, *Torrance* was bound to convey the land sold to the vendee. He had until 1839 to fulfil his part of the contract; although he had created incumbrances on the estate, he might have removed them, and although a decree had in October 1835, passed in *Baltimore* county court for the sale of the land, which by contract he was to convey, it was in his power to have prevented the sale, by paying the costs of the chancery suit, in *Baltimore* county court, and the liens for which the land had been decreed to be sold. This, however, he did not do, but suffered the decree to be executed by the sale of the land in January 1836, which event occurred after the decree of the superior court of *Virginia*, by which event occurring after said decree, he had effectually placed it out of his power, either to convey, or to procure the title to the land he had contracted to convey.

Leaving out of view, therefore, all the acts of *Torrance* anterior to the date of the decree in *Virginia*, as upon this branch of the subject, not properly examinable, being foreclosed by the decree, the fact of the sale afterwards, by which he has disabled himself from complying with his contract, has created a new ground of equity in the complainants, which calls upon this court for the exercise of its restraining authority. This, however, can only be accomplished through the person of the defendant, who is within the jurisdiction of this court, and will not enable the court, as prayed by the complainants, to vacate

any of the proceedings which have taken place under the *Virginia* decree. The defendant ought, therefore, to be enjoined seeking to enforce his decree, from accepting a conveyance of the lands purchased under said decree, or if he has obtained a title, he ought to be decreed to reconvey the same to the heirs of *James A. Buchanan*.

From the views we have taken of this case, the contract of purchase must be rescinded; and it is insisted, that it should be upon the condition of paying to the vendor interest on the purchase money, and an equivalent in value for the deterioration of the property, during the continuance of the possession of the vendee.

For any deterioration of the property sold by the improvidence, or culpable negligence of the vendee, her representatives should be answerable, but not otherwise. 2 *Dana*, 375.

If the vendee were put in possession of the land, for all the time it was occupied by her, or her agents, she should be made to account for the rents and profits. It has been contended, that interest should be allowed for the use of the land, instead of rents and profits. The general rule may be, that when the purchaser is let into the possession and the perception of the rents and profits, he ought to pay interest on the purchase money; the buyer, being the owner of the land, must rest satisfied with the rents and profits, and the seller, the owner of the money, is entitled to interest. But as there is, generally, a great disproportion between the rents and profits, and the interest of the purchase money, there would be no propriety in applying the rule to a case where the sale was rescinded. In such a case, a court of equity could never treat the vendor as entitled to the purchase money, or consider the vendee as the owner of the land. These views will be found to be sanctioned by 3 *Leigh*, 647, 648; a different rule would seem to have prevailed in some of the States, 2 *Dana*, 375; but we cannot adopt the principle of that case, because we think it would operate injustice.

There is, however, no legal evidence in the case, going to shew the possession of the vendee, or its duration, or whether the deterioration of the property proceeded from casualty or

negligence, or the value of the rents and profits, and therefore again remand the cause to the court of Chancery, that evidence may be taken on these subjects, in order that justice may be effectuated between the parties.

CAUSE REMANDED.

JOHN H. CLAGETT, A. D. B. N. OF JOHN H. BEANES, *vs.* WALTER B. C. WORTHINGTON, TRUSTEE OF M. MAGRUDER.—*June*, 1845.

B devised to *M:* "my dwelling, and all the grounds, land, &c., attached thereto, to hold during the life of my brother *C*, for the use of my said brother during his natural life; and after his death, I devise the same to *M*, to hold in trust for the use of *P*, the grandson of my brother *C;* and in case the said *P should have issue of his body, lawfully begotten*, then I will and devise the same to *P* in fee; but in the *event of his dying without such issue*, I will that the same be sold by my executor, and the proceeds thereof, I devise as follows: *one-half* thereof to my nephew, *H*, and the *other half* to *M*, to hold during the life of my sister, in trust for her sole use; and at her death, the principal to be equally divided among her children."

The testator also devised to *M*, in trust for the use of *P*, one-fourth part of the proceeds of the residue of his property, *real, personal* and *mixed*, directed by his will to be sold; and also one-fourth part of his debts, requesting the trustee, *M*, to invest the same, and apply the interest thereof to the use of *P*, and in case he should *have issue of his body, lawfully begotten*, then the investments to be made over to *P;* and in *the event of his dying without issue of his body, lawfully begotten*, then one-third part thereof to *H;* one-third part to *C;* and one-third part to *M*, in trust for his sister, as before. HELD;

The intention of the testator is apparent, that the one-third part of the debts and residue of his estate, devised in trust for his sister, should vest in his trustee, at the same time and upon the same contingencies with the moiety of the proceeds of sale of the real estate, mentioned in the first clause above recited.

The correct interpretation of the bequest, in relation to the debts and residue, depends upon the true construction of the devise of the real estate.

A trust estate for life is in the first instance given to *P*.

There is no limitation over of the property devised, (conceding that the life estate had been unincumbered by the trust,) to the heirs, or issue of the body of *P*, so as to let in the operation of the rule in *Shelly's* case.

The limitation over, after the trust estate to *P*, for life, is to himself in the event of his having issue.

The limitations over to *H*, and the sister of the testator, were not made dependent upon *P's* fee, or to take effect upon its termination, by the happening of a contingency provided by the testator, for its duration.

The vesting of the fee in *P*, by his having children, put an end to the limitation over, to *H* and the sister of the testator, and left the estate of *P* absolute.

The limitation over in their favor was not intended to follow the fee, and to vest and be enjoyed only after its investiture, and contingent determination, but was intended as a substitute for the fee, in case of its never coming into being, according to the contingency provided for its creation.

The limitation in fee to *P*, cannot operate as a vested remainder, as its coming into existence, or vesting, depends on a contingency which may never happen, to wit, his having lawful issue.

It is good as a contingent remainder, because of the previously given particular estate for life, on which it depends, and which supports it. The happening of the contingency terminates the life estate in *P*, and creates a fee in its stead.

The non-occurrence of the contingency, and natural termination of the particular estate for life, by the death of *P*, gives effect to the substituted contingent remainder in fee, in favor of *H*, and the sister of the testator.

The vesting of the contingent remainder in fee to *P*, depending on the contingent termination of his life estate, by his *having* issue; whilst the substituted contingent remainder, in favor of *H* and the sister, can only take effect, or vest by the death of *P*, *without* having had lawful issue.

This kind of alternative limitation is termed, a contingency with a double aspect.

Where a testator intended that certain limitations over, both as to the realty and personalty, should take effect at the same time, and upon the same contingencies, this court having said, that *the failure of issue*, as to the realty, meant *without ever having had issue*, cannot hesitate to give the same construction to the same words in the limitation over, as to the personalty.

A party who seeks to recover in equity against one of the several sureties, in a trustee's bond, the whole amount of his claim against a defaulting trustee, must not only prove the insolvency of the principal in the bond, but of all the other co-securities.

The co-securities, or their representatives, should be parties to such a proceeding.

The fact that a surety in a trustee's bond, is also a distributee of the fund in his hands, will not authorize another distributee to require a court of equity to apply the portion of the fund due to the first distributee, in discharge of his obligation as surety, where the trustee is in default. The remedy for non-performance is at law.

A creditor of a distributee in chancery, claiming by petition, to be paid his debt out of a fund in court to be distributed, must show himself remediless at law; or that he has some lien or title to the fund sought, which it is the duty of a court of equity to enforce.

This was an appeal from the court of chancery.

On the 2nd July 1833, *James A. Magruder*, and *Millicent*, his wife, filed their petition on the equity side of *Prince George's* county court, having reference to the will of *Wm. Beanes*, dated 24th September 1827, and the codicil thereto, dated 3rd July 1828, (a copy of the material parts of which will be found in the opinion of this court, post 89,) and alleging the death of the testator; *John R. Magruder; Colmore Beanes*, and *Philip Key*, without lawful issue; and also of the executors of said will, and praying the appointment of a trustee to make sale of the real estate of the said *William Beanes*.

The county court, on same day, appointed *John B. Brooke* a trustee, for that purpose, who gave bond in that character, made various sales, which were ratified, and on the 13th October 1835, an account was stated, showing sales to amount of $5284, of which sum *Millicent Magruder* was allowed $2475.40.

After this, *David Crawford*, trustee of *M. M.*, filed his petition, alleging that on the death of *John R. Magruder*, one of the executors, the fund in which *M. M.* was interested was paid over to *James A. Magruder*, a trustee for her, who gave bond, that he is insolvent, and had failed to distribute the fund he had received. The petition then prayed that the amount due her might be retained out of the proceeds of property of the testator decreed to be sold, and that the said *J. B. B.*, trustee, pay out of the fund in his hands, the amount which the petitioner is entitled to receive of *James A. Magruder*, of the fund held by him, as trustee for *Philip Key*, &c.

James A. Magruder was appointed trustee in the place of *John R. M.* 22nd April 1831, and gave bond as such, with *Philip Key*, *Colmore Beanes*, and *John H. Beanes* as his sureties.

On the 10th December 1835, an account was audited between the estate of *Philip Key*, deceased, with *James A. Magruder*, trustee, in which a balance of $4953.40 was awarded, one-third to the representatives of *Colmore Beanes*; one-third to the trustee of *Mrs. M. Magruder;* one-third to *John H. Beanes*; each, $1651.14. These were sums which had been invested in bonds.

At July 1837. The county court ordered that *John B. Brooke*, the trustee, retain in his hands, until the administrator of *John H. Beanes* answer her petition, the amount allowed to the said *J. H B.*, out of the proceeds of the property herein decreed to be sold, subject to the future order of the court.

Thomas H. Clagett, the *a. d. b. n.* of *John H. Beanes*, answered the petition of *D. C.*, and after admitting the various proceedings before referred to, and alleging his ignorance, how the said *James A. M.* had managed his trust, further alleged, that the bequest made to *John R. Magruder*, in trust for *Philip K.*, was not to be divided between *J. H. B.*, *C. B.*, and *M. M.*, but that the trustee was to pay *M. M.* the interest accruing on her part, for her separate use during her life; and after her decease to pay the principal to her children, under an equal division, vested in the said *Philip K.* an absolute right or estate in said property, it being personal; that the limitation over to the said *M.* and her children, and to the said *C. B.* and *J. H. B.* was void. The answer denied that *J. H. B.* and *C. B.* died insolvent. That the remedy on the bond of *James A. M.* is at law. That the trustee's account must be first settled before the bond is liable, &c.

A commission was issued, and proof taken; in February 1838, the cause was removed to the court of chancery, where exceptions to the evidence, and sufficiency of the averments in the petition of the complainants were filed.

On the 16th November 1840, the Chancellor, (Bland,) referred the case to the auditor with instructions.

On the 11th December 1841, the Chancellor, upon petition, appointed *Walter B. C. Worthington* trustee of *M. M.*, in the place of *David Crawford*, deceased, &c., and *John H. Clagett*, *a. d. b. n.* of *J. H. B.*, was made a party to the cause. Accounts were again stated. Account A allowed the appellee $2389.50, as due by the estate of *Philip Key*, in account with *J. A. M.* This balance was transferred to account B, balance in favor of appellee, $1951, as due from *J. A. M.* To these accounts the appellants excepted.

On the 12th May 1843, the Chancellor, (Bland,) ratified those accounts, and ordered the trustee, *James A. Magruder*,

to apply the proceeds accordingly, &c., and that out of the dividends of the proceeds of sale of the real estate of *William Beanes*, deceased, made by *John B. Brooke*, and assigned to *John H. Beanes*, the said *J. B. B.* pay to the appellee the sum of $1951, with interest, &c., which said sums shall be held and applied by the said appellee, in trust, for the use of *M. M.*, during her natural life, and after her death, the said sum to be equally divided among her children, according to the will of *W. B*, deceased.

From this decree *John H. Clagett, a. d. b. n.* of *John H. Beanes*, prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, and CHAMBERS, J.

By C. C. MAGRUDER and W. H. TUCK for the appellants, who insisted:—

1st. That *Millicent Magruder* had no interest in that part of the personal estate which was bequeathed in trust for *Philip Key*, and therefore no cause of action accrued to her trustee on the bond of *James A. Magruder*, as trustee of *Philip Key*.

2nd. If her trustee had any cause of action on the bond, his remedy was at law, it appearing that the sureties were solvent at the time of their death.

3rd. That *Millicent Magruder* has no claim to satisfaction out of the proceeds of the real estate, on the assumption that these several proceedings are to be treated as an entire and blended course of judicial proceedings, in the same court, in relation to the same subject. The will does not authorise the payment of this claim out of the real estate.

4th. That the character in which *Daniel Crawford* files his petition, is not sufficiently averred; nor does he shew how he was appointed trustee for *Mrs. Magruder*. The present trustee's, (*Worthington*,) appointment, if regular, does not cure these defects.

5th. That the petition does not make the heirs and executor, or administrator, of *Colmore Beanes*, nor the heirs of *John H. Beanes*, parties to the cause.

6th. That the third and fourth answers of *John B. Brooke* must be excluded, because the witness does not state facts; but his answers are argumentative and inferential.

7th. That the auditor's accounts, A and B, should have been rejected on the exceptions taken thereto by the appellant, and the same exceptions are relied on in this court.

8th. That if any thing was due the said petitioner, as trustee, the amount so due is shewn by account C, which should have been ratified, and the petitioner's exceptions thereto overruled.

By J. Johnson, for the appellee.

In affirmance of the order of the Chancellor, it will be insisted:—

1. That the limitation over to *John H. Beanes, Colmore Beanes,* and the trustee of *Millicent Magruder,* of the one-fourth of the residue of the testator's estate, after the death of *Philip Key,* was good.

2. That under all the circumstances of this case, and looking to the actual condition of the fund in controversy, the chancery court was competent to grant the relief prayed by the petition, filed by *Crawford,* as the trustee of *Millicent Magruder,* on the 11th of July 1837, and that the aid of the court was properly invoked in that form.

3. That all the proper parties are before the court; that no valid objection exists to the form in which the claim was presented by the petition, or to the title therein set forth; and that especially, the title of the present appellee is beyond question or dispute.

4. That the evidence excepted to by the appellee was inadmissible.

Dorsey, J., delivered the opinion of this court.

The codicil to the last will and testament of *William Beanes* contains the following devises, viz: "Whereas, by my said will, I do will and devise to *John Read Magruder,* my present dwelling, and all the grounds, garden, buildings and enclosures attached thereto; also the mill, meadows, and all the land attached to and adjoining the same, during the life of my brother,

Colmore, in trust, to receive and apply the profits thereof to his use and benefit: after his death, do will and devise the same to his grand-son, *Philip Key*, in fee simple, reserving the grave yard in the garden, which is to be kept up and in complete order by my executors. Now I do hereby revoke and annul the said clause or clauses, devise or devisees, and do will and devise as follows, to wit: I will and devise to *John Read Magruder, Sr.*, my dwelling, aforesaid, and all the grounds, garden, buildings and enclosures attached thereto, reserving the grave yard, in the garden, which is to be kept up and in complete order by my executors, who are, at all times, to be permitted to have free access to the same; also the mill, meadows, and all the land attached to and adjoining the same, to hold the same during the life of my brother *Colmore*, in trust, to receive and apply the proceeds to the use and benefit of my said brother during his natural life; and after his death, I will and devise the said dwelling, grounds, garden, buildings and enclosures attached thereto; and the mill, meadows, and lands attached to and adjoining the same to *John Read Magruder, Sr.*, aforesaid, to hold the same in trust for the use and benefit of *Philip Key*, the grand-son of my brother, *Colmore*, and to receive and apply the profits thereof to his use and benefit; and in case the said *Philip Key* should have issue of his body lawfully begotten, then I will and devise the said dwelling, mill, &c., to the said *Philip Key*, in fee simple, but in the event of his dying without such issue, I will and direct that the same be sold by my surviving executor, &c., and the proceeds thereof I bequeath as follows: that is to say, one-half thereof to my nephew, *John H. Beanes*, and the other half to *John Read Magruder, Sr.*, aforesaid, to hold the same during the life of my sister, *Millicent Magruder*, in trust for her sole and separate use and benefit, &c.; and at her death the principal to be equally divided among her children. And whereas, also, by my said will, I did give and bequeath to *Philip Key*, aforesaid, one-fourth part of the residue of my property, real, personal, and mixed, directed by my said will to be sold; and, also, one-fourth part of my debts, which said legacy I do hereby also annul and revoke, and do give and bequeath to the said *John Read Ma*

gruder, Sr., in trust for the use and benefit of the said *Philip Key*, the said one-fourth part of the proceeds of the residue of the property, aforesaid; and also the one-fourth part of my debts, hereby requesting him to invest the same in stock, or loan it on good security, and apply the interest thereof to the use and benefit of *Philip Key*, aforesaid, and in case he should have issue of his body lawfully begotten, then the stock or bonds, or other securities in which the said investment may have been made, to be made over and transferred to the said *Philip Key;* and in the event of the said *Philip Key* dying without issue of his body lawfully begotten, then I give and bequeath one-third part thereof to my nephew, *John H. Beanes;* other third part, I give and bequeath to my brother, *Colmore Beanes;* and the other third part I give and bequeath to the said *John Read Magruder, Sr.*, to hold the same in trust for the sole and separate use and benefit of my sister, *Millicent Magruder*, during her life, hereby requesting the said trustee to apply the interest thereof, during her life, to her sole and separate use and benefit; and at her death, to divide the principal equally among her children."

On reading the herein before recited clause of the codicil, we think the intention of the testator is apparent, that the one-third part of the debts and residue of the testator's estate, bequeathed in trust for *Millicent Magruder*, should vest in her trustee at the same time, and upon the same contingencies, with the moiety of the proceeds of the sale of the real estate mentioned in the preceding part of the said clause. Such intention being conceded, it is the duty of the court to carry it into effect, if not inconsistent with some unbending rule of law. In order, therefore, to arrive at a correct interpretation of the bequest in relation to the residue, &c., it is proper to ascertain the true construction of the devise of the real estate disposed of in the preceding part of this section of the codicil. That a trust estate, for life only, is in the first instance given to *Philip Key*, cannot be denied. That there is no limitation over of the property devised, (conceding that the life estate had been unincumbered by the trust,) to the heirs or issue of the body of *Philip Key*, so as to let in the operation of the rule in *Shelly's* case, is equally undeniable. The limitation over, after the trust estate to him

for life, is to *Philip Key*, himself, in fee simple, in the event of his having issue. The superadded limitation over, in favor of *John H. Beanes* and *Millicent Magruder*, was not made dependent upon this fee simple estate, or to take effect upon its termination, by the happening of the contingency supposed to have been provided, in the codicil, for its duration. On the contrary, the vesting of the fee simple estate in *Philip Key*, by his having children, put an end to the limitation over, in favour of *John H. Beanes* and *Millicent Magruder*, and left the estate of *Key* absolute, and exempt from all contingencies for its determination, as far as the codicil of the testator was concerned. The limitation over, in favor of *John H. Beanes* and *Millicent Magruder* was intended not to follow the fee simple estate, and to vest and be enjoyed only after its investiture and contingent determination, but was intended as a substitute for the fee simple estate, in case of its never coming into being, according to the contingency provided for its creation.

Assuming this to be a correct view of the intention of the testator, let us see what is the character of the estates, created by this codicil, and how far, according to the established principles of law, applicable to such subjects, this intention of the testator can be carried into effect. In *Hoxton and wife's lessee vs. Archer and others*, 3 *Gill and John.*, 199, this court say "it is a general rule, in the construction of wills, that a limitation, which may operate as a remainder, shall not be construed an executory devise." And this is but the assertion of a hornbook principle of the law of *England*. The limitation in fee simple to *Philip Key*, cannot operate as a vested remainder as its coming into existence, or vesting, depends on a contingency which may never happen, to wit: *Philip Key's* having lawful issue. It is good as a contingent remainder, because of the previously given particular estate for life, on which it depends, and which supports it. The happening of the contingency terminates the life estate in *Philip Key*, and creates a fee simple in its stead And the non-occurrence of the contingency, and natural termination of the particular estate for life, by the death of *Philip Key*, gives effect to the substituted contingent remainder in fee, in favor of *John H. Beanes* and *Millicent*

Magruder, and causes it to vest. The vesting of the contingent remainder in fee to *Philip Key*, depending on the contingent termination of his life estate, by his having issue, whilst the substituted contingent remainder, in favour of *John H. Beanes* and *Millicent Magruder*, could only take effect, or vest, by the natural expiration of the life estate; that is, by the death of *Philip Key*, without having had lawful issue. And this kind of alternative limitation is termed a contingency with a double aspect. The interpretation we have given of this first part of the testator's codicil, is in accordance with the doctrine to be found in *Fearne* on contingent remainders, p. 373, where it is stated, "that although a fee cannot, in conveyances at common law, be mounted on a fee, yet two or more several contingent fees may be limited merely as substitutes or alternatives, one for the other, and not to interfere, but so that one, only, take effect, and every substituted limitation be a disposition substituted in the room of the former, if the former should fail to take effect."

Having, as we suppose, ascertained what, according to the rules of law, was the intention of the testator in the devise made by him, in favor of *John H. Beanes* and *Millicent Magruder*, of the real estate mentioned in the first part of his codicil; and having assumed, what we think cannot be denied, that the testator intended that his bequest, in their favor, of the residue of his estate and debts should take effect at the same time, and upon the same contingences that are applicable to the realty; let us see, as this bequest of the residue, &c., is to be regarded as a disposition of personalty, how far the intention of the testator, in relation to it, can be effectuated according to the established rules of law applicable to such subjects.

According to the old doctrines of the common law, a gift or grant of chattels for life, vested the absolute property in the donee or grantee; and a bequest of them by will for life, "amounted to so absolute a gift as to invalidate any further limitation after the first legatees death," But in note (E.,) to *Fearne Con. Rem.*, 402, it is stated, that "in personal property, under which both chattels real and chattels personal are included, there cannot be a remainder in the strict sense of the word; and therefore,

every future bequest of personal property, whether it be preceded or not preceded by a particular bequest, or limited on a certain or an uncertain event, is an executory bequest, and falls under the rules by which that mode of limitation is regarded." So 2 *Rop. on Leg*,, 351, states, that "although the law does not allow of limitations of personal estate by way of remainder, in the proper use of that term, yet by executory bequest or trust, interest in the nature of remainders may be created by will or deed." And that the same effect would be given to a limitation over in a deed for a chattel, may fairly be inferred from the case of *Johnson vs. Negro Lish.*, 4 *H. & J.*, 441. "In dispositions of personal property, the courts generally incline to the construing a limitation after a dying without issue, to mean a dying without issue at the death of the first legatee, in order to support, if they can, the limitation over; yet, in relation to real estate, the construction is generally otherwise." See the case, *Newton et al. vs. Griffith et al.*, 1 *H. & G.*, 111; and in *Biscoe vs. Biscoe*, 6 *Gill & John.*, 232, this court have said, that in "relation to executory bequests of personal property, dependent upon a dying without lawful heir, or leaving issue, &c., the language of the will may be restricted to mean a dying without issue living at the death of the taker, or another person in *esse*, by any clause or circumstance in the will that can indicate such intention in the testator; and, in order to support the limitation over, the courts, in such cases, generally incline to lay hold of any expression or circumstance in the will that seems to afford a ground for such a construction." And such is the inclination of the courts to give effect to executory bequests of personalty, that where in the same clause in the same will, there has been a limitation over, of real and personal property, after a failure of issue, they have held the limitation over, as to the personalty, good, as not being too remote, whilst the same limitation over, as to the realty, has been held to be void, on the ground of its being too remote. Under the influence of such adjudications, and with the assumption we have made, that the testator intended that the limitations over, both as to the realty and the personalty, should take effect at the same time, and upon the same contingen-

cies, how can this court, after having said that the failure of issue, as to the realty, meant "without ever having had issue," hesitate to give the same construction to the same words in the limitation over, as to the personalty?

Assuming then, that *John H. Beanes*, or he who represents him, is entitled to the fund sought to be reached in the present proceeding, and that the trustee of *Millicent Magruder* is entitled to the sum bequeathed to her under the residuary clause of the testator's codicil, the remaining enquiries are, has he shewn himself entitled to recover it, under the proceedings now before us? And if so, to what amount is the recovery to be had?

The opinion we have formed upon the first of these enquiries superseded the necessity of our consideration of the second, and also our determination of a large proportion of the numerous questions which were raised and discussed in the trial of this cause.

To entitle a party seeking to recover in a court of equity, against one of several sureties in a trustee's bond, the whole amount of his claim against the defaulting trustee, he must prove not only the insolvency of the principal in the bond, but of all the other co-securities. In the record before us there is no evidence to shew, that *Philip Key*, one of the securities, died insolvent, or that his estate in the hands of his representatives is not abundantly sufficient to meet all liabilities against him, in virtue of his suretyship. Nor have his representatives been made a party to this proceeding of the trustee of *Millicent Magruder*, nor have they had any opportunity of answering his petition. The order of the chancellor, appealed from, is erroneous upon this ground, if exempt from the many other errors which have been imputed to it. But apart from this objection the whole proceeding on the part of the trustee is clearly erroneous, upon another ground: a court of chancery has no power to grant the relief prayed for under the circumstances existing in this case; it has no such jurisdiction over the subject matter as would warrant its granting the relief which has been prayed.

In *Richardson vs. Jones*, 3 *Gill & John.*, 163, where an effort was made to compel a purchaser and his sureties under a chancery sale to the former, to bring into court the purchase money, this court determined, that "when a bond is given to the trustee for the purchase money, under an order of sale from chancery, requiring a bond to be given, and the sale has been ratified, the purchaser and his suretics cannot be compelled to pay the bond in a summary way, by an order from chancery. This constitutes a legal contract to be enforced at law." And in a like case of *Boteler and Belt vs. Brookes*, 7 *G. & J*, 143, this court said "the sureties of such a trustee have no official duties to perform, assume no responsibility to the court, but, in general, enter into a merely pure, legal contract of suretyship, incapable of coercion, except through the medium of the appropriate forum, for the enforcement of such contracts—a legal tribunal." The same may be emphatically said of the suretyship now in question before us; and the condition of the surety is in no wise changed by the simple fact, that he is a distributee, or entitled to a sum of money to be paid over to him, under the order of the chancery court. That fact, of itself, gives to the chancery court no authority to enforce his compliance with his mere legal liabilities. The remedy for their non-performance, if attainable there, must be sought in a court of law. As regards the jurisdiction acquired by the chancery court, in consequence of there being a fund there distributable and payable to him, over whom the jurisdiction is attempted to be exercised, there is no distinction between a surety, and any other debtor thus entitled. And surely it will not be contended, that the mere circumstance of a debtor being entitled to fund in chancery, is to disfranchise him of his invaluable common law right of contesting before a jury of his country, all legal claims which his creditors may prefer against him. The establishment of such a doctrine is the necessary result of giving to the trustee of *Millicent Magruder* the relief he has sought in the proceedings before us.

It is true, that where, in a suit in chancery, there is a fund in court for distribution, a person, not a party to the suit, (if all the necessary parties are before the court,) may, in the sum-

mary way of petition, assert his right to the whole, or any portion of the fund. But what must he shew to entitle himself to the relief he seeks? simply (as here,) that he is, at law, a creditor of one of the distributees of the fund? Assuredly not. If he thus claims, as a creditor of a distributee, he must shew himself remediless at law, or that he has some lien or title to the fund sought, which it is the duty of a court of equity to enforce. The trustee of *Millicent Magruder* has shewn himself in no such predicament; he has no such claims to the interposition of a court of equity: his claim is strictly a legal one; he can obtain the full benefit of it at law, and there he must pursue it. The estate of *John H. Beanes*, in the hands of his representatives, has been proved to be abundantly sufficient to meet it.

The order of the chancellor, of the 12th of May 1843, appealed from in this case, is reversed with costs.

ORDER REVERSED WITH COSTS.

THE MERCHANTS BANK *vs.* THE MARINE BANK.—*June* 1845.

On the 20th September 1839, the *Marine Bank* issued their certificate of deposite, payable to *S* or order. It was mailed for *St. Louis*, and an endorsement by *S*, forged, when it was passed to *B* of *Illinois*, for value, *bona fide;* that house remitted it to *H* of *New York*, who remitted it to *W* of *Baltimore*, customers of, who deposited it with the *Merchants Bank* for collection, and obtained a credit for it in account, on the 2nd November. On the 4th, the *Marine Bank* paid it to the *Merchants Bank*. On the 21st, the former institution discovered the forgery, immediately gave notice to the latter bank, and demanded its payment. Between the 2nd and 18th November, *W* had always to his credit with the *Merchants Bank*, a larger sum than the amount of the certificate. On the 19th it was less, but on the 20th, 21st and 22nd, it was again greater. There were daily transactions deposites and checks, by *W*, with and on the *Merchants Bank*. The *Marine Bank* having paid the certificate to the real payee, brought an action against the other bank, which it had also paid previously, to recover back the amount of the certificate. HELD:

1st. That if the *Merchants Bank* was a *bona fide* holder of the certificate, for value paid, it would not have been responsible in this action,

2nd. There was evidence, that on the day on which the forgery was discovered, and the demand made on the defendants to refund the money, that there was standing to the credit of *W*, on the books of the *Merchants Bank*, a larger sum than the amount of the certificate.

3rd. If at the time the forgery was discovered, and the demand of payment made, *W* had withdrawn from the *Merchants Bank* the balance to his credit, the *Merchants Bank* would then have been a *bona fide* holder for value.

4th. The credit to *W* on the books of the bank for the amount of the certificate was not conclusive, and did not prevent the bank from correcting the account when the forgery was discovered; if it then had funds in their possession adequate to that purpose, the credit was only *prima facie* evidence.

The cashier of a bank possesses no incidental authority to make any declarations binding the bank, not within the scope of his ordinary duties.

If the cashier of a bank promise to pay a debt which the corporation did not owe, or was not liable to pay, or should admit forged bills to be genuine, such promise or admission would not bind the bank, unless it had authorized or adopted the act.

An agreement of facts made, and filed in a cause prior to its first trial, which after judgment was reversed upon appeal, is competent evidence upon a second trial, under a *procedendo*.

Appeal from *Baltimore* county court.

This was an action of *assumpsit*, docketted by consent to January term 1840, by the appellees against the appellants.

The general issue only was pleaded.

At May term 1840, the parties filed the following statement, signed by counsel:

Joel Vickers, on the 20th September 1839, deposited in the *Marine Bank of Baltimore* $762, and received therefor the annexed certificate of deposite, which, it is admitted, is the usual form of certificate of deposite in the banks of this city. *J. Strodtmann*, to whose order said certificate was made payable, was personally unknown to the officers of said bank, had never been among its customers, and never had any previous transaction with the bank. The hand-writing of *Strodtmann* was unknown to the officers of the bank, but it is admitted, that after the deposite was made, *Philip Littig, Jr.*, Cashier of the *Marine Bank*, received from a brother-in-law of *J. Strodtmann*, a signature of —— *Strodtmann*, as he stated at the time, which the said cashier pasted in the signature or firm book of the bank, but without informing any of the clerks of the bank

that he had done so, nor was it, in his opinion, material, according to the usage of that bank, as certificates are usually given for the use of persons at a distance, as payees, whose signatures it is not the practice of the bank to obtain. It is admitted, that the signature of *J. Strodtmann*, pasted in the signature book as aforesaid, was genuine, and that the officers of said bank had access to said signature book, as well as to all the other books of the bank. The certificate was, on the 20th September 1839, enclosed by —— ——— in a letter directed to *St. Louis*. It was never received by said *Strodtmann*, but fell into the hands of some other person who forged thereon the endorsement of said *Strodtmann*, and passed it for a valuable consideration to *B. Godfrey & Co.*, of *Alton*, in the State of *Illinois*, who endorsed and transmitted to *Howes, Godfrey and Robinson*, of *New York*, who also endorsed and transmitted it to *Weld and Jenks* of *Baltimore*, who kept an account with the *Merchants Bank of Baltimore*, in which account they were credited with this certificate on the 2nd day of November 1839, as cash, or endorsing and delivering said certificate to said bank. On the 4th November 1839, the *Merchants Bank* presented said certificate for payment at the *Marine Bank*, and obtained the amount thereof. On the 21st of November ensuing, the forgery was discovered upon the complaint of the brother-in-law of *Strodtmann*, that said certificate had never come to hand, although an unusually long time had elapsed since its transmission. Immediately upon the discovery, and upon the same day, the *Marine Bank* gave notice to the *Merchants Bank* of the forgery, and demanded a return of the money paid to the *Merchants Bank* as the bearer of the certificate, the *Marine Bank* having since and before the institution of this suit paid *J. Strodtmann*, the payee of said certificate, the amount thereof. The question is submitted to the court upon the foregoing statement of facts, whether the *Marine Bank* is entitled to recover from the *Merchants Bank* the amount so paid. The annexed copy of the certificate, and of the endorsements thereon, it is agreed shall be received as a part of this statement.

The copy of certificate and endorsement above referred to is in the form following:

"$762. *Marine Bank of Baltimore. Baltimore, September 20th*, 1839. *J. Strodtmann* has credit for seven hundred and sixty-two dollars in the *Marine Bank of Baltimore*, subject to his order on the return of this certificate, deposited by *Joel Vickers*. Signed, *Philip Littig, Jr., Cashier.*"

Endorsed, "Pay to the order of *B. Godfrey & Co. J. Strodtmann*. Pay *Howes, Godfrey and Robinson*, or their order. *B. Godfrey & Co.* Pay *Weld and Jenks, Howes, Godfrey and Robinson. Weld and Jenks.*"

"The *Marine Bank of Baltimore* paid the amount of the within certificate to the *Merchants Bank of Baltimore*, on the 4th November 1839. *D. Sprigg, Cashier.*"

"January 10th, 1840. Received payment of the *Marine Bank of Baltimore. J. Strodtmann.*"

(Written in red ink on the face.) "Number one hundred and seventy-four, seven hundred and sixty-two dollars. *Louis E. Smith, B'k.*"

At January term 1841, the cause was tried and a verdict rendered for the defendants. The plaintiffs, now appellees, appealed; and in the Court of Appeals the record was amended by a further agreement to insert, in the statement of facts in the fourth sentence thereof, the following words, "after said certificate of deposit was issued, and before it was presented for payment to said *Marine Bank*," so that said sentence shall read as follows—"*Philip Littig, Jr., Cashier* of the *Marine Bank*, after said certificate of deposite was issued, and before it was presented for payment to said *Marine Bank*, received," &c. That the *Marine Bank*, at the time of paying, and the *Merchants Bank* at the time of receiving the amount of the certificate of deposite, on November 4th, 1839, were both ignorant of the forgery; also, that the name of *Strodtman* was correctly written "mann" in the body of the certificate, while the forged endorsement was written "*man.*"

And the judgment was reversed and the cause remanded.

At the second trial in the county court, the plaintiffs obtained a verdict, and the defendants below prosecuted this appeal.

1st Exception. At the trial of the case, the plaintiffs to maintain the issue on their part, offered to read in evidence to

the jury the statement of facts agreed upon by the counsel of the parties, and submitted to the county court upon the previous trial of the cause, to the admissibility of which, as evidence in this trial, the defendant objected; but the court overruled the objection, and permitted the said statement to be read in evidence, and it was accordingly read to the jury by the plaintiffs, to which the defendant excepted.

The plaintiff next proved by *Louis E. Smith*, an officer of the *Marine Bank*, that on the day the forgery was discovered, he apprised *Mr. Sprigg*, the cashier of the defendant, of the fact of the forgery, and demanded payment of the amount previously paid to the defendant by the *Marine Bank* on said certificate; that *Mr. Sprigg* gave it as his opinion that the defendant was both legally and morally bound to refund the amount, but asked a short time for consultation with *Weld* and *Jenks*, who had deposited the certificate with the defendant, and promised to give an answer upon the subject in about half an hour; that after the lapse of the time appointed, or thereabouts, the witness called again, and told *Sprigg* that the *Marine Bank* was anxious to have a positive answer, as the brother-in-law of *Strodtman* was waiting to receive one; that *Sprigg* then informed the witness that it was all right, and that the amount would be refunded; that the witness then asked him, (*Sprigg*,) for the amount, and that *Sprigg*, with a view as witness supposed, of directing the teller of the defendant to pay the amount, advanced towards said teller, but finding the latter busy stopped; that witness then asked him if the matter was to be considered settled, to which *Sprigg* replied yes, and authorised witness to have it sent in the lists which are exchanged every morning between the banks; that from the usage among bank officers so to do, he relied as confidently on the statement of *Sprigg* that it would be done, as if it was done, and witness therefore considered the promise of *Sprigg*, and the direction to send in the certificate, as equivalent to the allowance of a credit to the *Marine Bank* to the amount of the certificate, and an absolute settlement of the transaction; that with this understanding witness returned to the *Marine Bank*, and communicated the result of his interview, and immediately thereupon,

and in consequence of the assurance of *Sprigg*, the brother-in-law of *Strodtman*, was instructed by the *Marine Bank* to inform him, (*Strodtman*,) that the amount of the certificate was held by the *Marine Bank*, subject to his order, and that *Strodtman*, being thus informed, came on from *St. Louis* to *Baltimore*, and the amount was paid to him by the plaintiffs upon the 10th January 1840, as appears from the endorsement upon the certificate; that no entry however was made in the books of the plaintiff's bank, shewing that this amount was passed to the credit of *Strodtman*, and no memorandum in writing was made of the promise to the brother-in-law. The plaintiffs then gave in evidence by the same witness, the check list of the plaintiffs of the 22nd of November 1839, and that said list was transmitted by the plaintiffs to the defendant on the following morning, to wit, on the 23rd of November.

"MERCHANTS, *Nov'r* 22, '39.

A	80	
C	40	
	33	37
	50	
	203	37
Not (in pencil,)	762	
	965	37
	3490	10
	2524	73

Paid *Mr. Dorsey* seven hundred and sixty-two dollars, to be settled this day, November 23rd 1839. *Marine.*"

And that the item of $762, appearing on that day in said list, was for the certificate of deposite given in evidence, which was also sent in to the defendant upon the morning of the 23rd of November, in pursuance of the previous direction of *Sprigg;* and further proved by said witness, that according to the usage and practice of banks, the check list dated on any particular day, is not sent in by one bank to another until the day following its date.

The defendent then to maintain the issue on its part joined, read in evidence the testimony taken under the commissions sent for that purpose to *Alton*, *Illinois*, and *New York* city.

Deposition of *Winthrop S. Gilman* for the defendants: I saw the check marked A on or about the 8th October, A. D. 1839, when it was presented at the counting room of *B. Godfrey & Co.* for sale, by and in possession of a young man introduced to me by *George W. Fox*, whose name was *John Strodtman*. The firm of *B. Godfrey & Co.* purchased said check on the 8th October, A. D. 1839, from *Mr. John Strodtman* aforesaid, and gave him for same one and a half per cent. premium, paying him two hundred dollars cash, and the balance in two notes of hand, payable forty days from the 8th of October 1839, and due on the 17th and 20th November 1839, which said notes were paid by said firm of *B. Godfrey & Co.* I knew a person by the name of *John Strodtman* in October 1839, who had resided with *Mr. George W. Fox*, near *Alton*, but who stated he was then residing in *St. Louis*. I do not know when he left *Alton*, or where he is now residing. I was first informed that the first endorsement on the back of said check was a forgery, through a letter from *Messrs. Howes*, *Godfrey* and *Robinson* to *B. Godfrey & Co.*, dated New York, 29th November 1839, and received by them on the 13th December, A. D. 1839, about which time said letter was seen by me. Neither myself nor the firm of *B. Godfrey & Co.*, to my knowledge, had any notice that said endorsement was a forgery at the time of the purchase of said check by said firm. To my knowledge, the purchase of, and payment for said check by *B. Godfrey & Co.*, was a *bona fide* transaction. The firm were very careful in such purchases, and in this instance became satisfied that the interest in the check was really vested in the party offering it for sale. To the cross-interrogatory on the part of the plaintiff, he deposeth and saith, I first saw the check on or about the 8th day of October 1839, at the time it was offered for sale to *B. Godfrey & Co.*, and in the possession of *Mr. John Strodtman*. I was at that time a partner in the house of *B. Godfrey & Co.* Said certificate was purchased by said firm of *B. Godfrey & Co.*, and the agreement for price, and

the payment for the check, were made in *Alton*, as stated by me in my answer in chief. I had no previous acquaintance, nor had *B. Godfrey & Co.* any previous dealings with the seller of said check. He was recommended by *Mr. Fox* as a correct man, *Mr. Fox* himself being a man of respectable character. I do not now recollect whether I heard what *J. Strodtman's* business was at the time of the purchase of the check. The answers to the interrogatories in chief have been given on my personal knowledge, my recollection has been refreshed by recourse to the books of *B. Godfrey & Co.*, and I hereto annex a statement of the transaction as it appeared at the time, and as it has ever since appeared upon their books.

(B.)

J. Strodtman.

Dr. 1839—Oct. 31st.—To our note payable 17th, 20th Nov. 1839, -		$201	33
" " To our note payable 17th, 20th Nov. 1839, -		375	91
" 8, To cash, - -		200	00
		$777	24
1829.—Cr. Oct. 8th.—By certificate of deposite of *Marine Bank* of *Baltimore*, -	$762	00	
By premium on do. 1½ per ct., - -	11	43	
By interest on our notes,	3	81	
	$777	24	

Deposition of *Benjamin Ives Gilman*, was similar to *W. S. Gilman's*.

Deposition of *George W. Fox*, for the defendants. I first saw it, the certificate, in the hands of *John Strodtman*, who came from *St. Louis* to my house, and wished some advice as to negotiating, so that he might not be taken in. He shewed me a letter which he said was from his sister, written in *German*, and directed to him, advising him not to dispose of the certificate at less than its value. Said firm of *B. G. & Co.* did

purchase said check from *John Strodtman*, sometime in the autumn of 1839; said firm gave for said check one and a half per cent. premium. If I remember right, they gave $200 cash, and the balance in notes at 40 days. *S.* lived with me from March 1839, to September 18th, 1839. I resided about two miles and a half from *Alton*. After he left me he went to *St. Louis* to reside, and said he was going to buy a farm in *Missouri* after he received the money from his sister. I did not see him again until he came back with the check, sometime in the month of October following. As he came to me for advice, I told him there were merchants in *Alton* who were doubtless in want of eastern funds, and accordingly introduced him to *B. Godfrey & Co.* He was a farmer; I know not where he now is. I know of no other man by the name of *J.* or *John Strodtman* or *Strodtmann*. It was several months *after* he sold the check before I was informed that the name of *J. Strodtman* was a forgery. I was told by *Mr. Gilman*, one of the house of *B. Godfrey & Co.* I do remember that a man called at my house some months after the transaction, who said he was the real *John Strodtman*, making enquiry of me for the man who had worked for me by the name of *John Strodtman*. He wished to get information where the latter was, and said his real name was *Andrew*, if I remember right.

Deposition, *James Robinson* for the defendants. I have before seen the certificate marked A. I first saw it on or before the 23rd October 1839. It was received from *B. Godfrey & Co.*, by *H., G. & R.* It was enclosed in a letter from *B. Godfrey & Co.*, dated 9th October 1839, (being the letter hereto attached, marked C,) which was received by *H., G. & R.;* said letter was answered, (a copy of which letter is hereto attached, marked D.) The endorsement of *B. Godfrey & Co.*, on said certificate, I am well acquainted with, and have no doubt of its being genuine. The endorsement on the certificate of *H., G. and R.* is genuine; I am a member of the firm and wrote it myself. The firm of *B. G. & Co.* was established in the year 1839, at *Alton*, in the State of *Illinois*, and *H., G. and R.* was established at the same time in the city of *New York;* they did correspond and do business with each other during said

year. The character in which *H., G. and R.* received said certificate, was that of a remittance against a large indebtedness which then existed against *B. G. & Co.*, and which indebtedness was caused by the purchase of goods for their account, the acceptance and payment of their drafts, and the payment of their notes and other business transactions, and said certificate was passed to their credit in account. *H., G. and R.* did pay said *B. G. & Co's* note to *Goodwin, Fisher and Spencer*, for $483, the day following the receipt of said certificate, say on the 24th of October 1839, which payment I do believe was made in consideration of the funds they expected to be realized of said certificate, and I do not think said $483 would otherwise have been paid. The account marked E is a statement of the account between the two firms, from the 23rd of October 1839, down to the 15th February 1844, which shews the debt existing when said certificate was received, and the balance due at the present time with interest thereon. Said certificate was remitted by *H., G. and R.* to *Weld and Jenks*, of *Baltimore*, on the 31st October 1839, in the letter marked B of that date; said letter was written by me. Said certificate was remitted to *W. and J.* for the purpose of collection, and providing them with funds which they were advised to pay on *H., G. and R's* account to *Capt. Barze*, of barque *Isabella*, and which they did pay out of the funds so collected from said certificate, to the amount of about $166. The notice of the first indorsement of *J. Strodtmann* on said certificate being a forgery, was first received by *H., G. and R.*, between the 23rd and 25th of November 1839, from *W. and J.*, by letter dated the 22nd November 1839, being the letter marked F. *H., G. and R.* gave notice of the forgery to *B. G. & Co.*, on the 29th November 1839, by letter, of which a copy is marked G. I stood in the relation of partner in the concern of *H., G. and R.*, in October and November 1839, and have remained in same relation since, except for one year from April 1840, and am now a partner. *B. G. & Co.* failed about the 23rd October 1839; first note of their's which to my knowledge was protested, was on that day. My knowledge of the time *B. G. & Co.* having made payment to *J. Strodtman* for the certificate

in question, is derived only from their letter of 19th December 1839, which is marked H, and which contains all the information I have of the time and mode of ultimate adjustment of said certificate. The amount of said certificate was passed to the credit of *B. G. & Co.* in account, as certificate of deposit in the *Marine Bank*. The account marked I, is a copy of the account from their books, from 23rd October 1839, to the 1st January 1840. The house of *B. Godfrey & Co.* were in good credit here until their notes were protested.

Deposition of *Theophilus Nelson*, for defendants. The certificate was received from *B. G. & Co.*, on account of an indebtedness to *H., G. and R.*, although *H., G. and R.* did further advance funds for account of *B. G. & Co.*, in anticipation of the payment of this certificate and other funds not then matured; the statement of the account between the firms from the time of the receipt of this certificate to this time is marked E. The certificate was remitted by *H., G. and R.* to *W. and J., Baltimore*, on the 31st October 1839; a letter marked B, now shewn me, was written by *James Robinson*, a member of the firm of *H., G. and R.*, and the certificate was enclosed therein to *W. and J.* The certificate was remitted to *Weld and Jenks* for collection, and to be credited to *H. G. and R.* in general account. *H., G. and R.* at the time designing said funds, or such part as might be required to meet the expenses of a vessel which they had sent to *Baltimore* to take cargo, and a part of which funds *Weld and Jenks* had used for that purpose previous to the discovery of the forgery. Notice of the forgery was first given to *B. Godfrey & Co.* on 29th November 1839, by letter, a copy of which marked G. During the months of October and November 1839, and since, was book-keeper for *H., G. and R.*, and am in that situation at the present time.

(B.)

New York, 31*st Oct.* 1839.

Messrs. Weld and Jenks, Baltimore.

Gent:—We enclose certificate of deposit in *Marine Bank of Baltimore*, by *J. Strodtmann*, for $762, which please collect and pass to our credit. *Capt. Barze*, of barque *Isabella*, now

on her way to your city, and chartered to load for *Havre*, will call upon you for some funds to pay his expenses, which please advance, and if in need of any assistance, we shall be obliged by your rendering them.

We remain your friends,

HOWES, GODFREY AND ROBINSON.

(C.)

Alton, Oct. 9th, 1839.

Messrs. Howes, Godfrey and Robinson, New York.

Gent:—Our last respects were under date 7th inst., inclosing *Norton Johnson's* draft, 2nd inst., 30 ds. st., on *Earp. and Bros., Phil.*, for $1000, which hope arrived safely. We now enclose certificate deposite in *Marine Bank of Baltimore*, dated September 20th, 1839, to order of *J. Strodtman*, for $762, which please place to our credit.

Your friends and serv'ts,

B. GODFREY, & CO., *by C. J. Gilman.*

(D.)

New York, October 23rd, 1839.

Messrs. B. Godfrey & Co., Alton:

Gen:—Yours of the 9th is received, covering certificate of deposite on *Baltimore* for $762, to cash, which we should to-day have to pay from 12 to 13⅛ discount, &c. We have advised *Goodwin, Fisher and Spencer*, that your note in their favor, due to-day, for $1031.67, would not be paid, giving them the reasons, and requesting that they should withdraw it from the bank, at the same time promising, that as soon as funds were realized, we would apply them to the payment of their note, crediting you with all remittances except the 30 days draft on *Earp. and Bros.*, and the certificate of $762 received to-day. Our cash account stands very nearly square, and as we think it certain, that when the news of the suspension reaches you, the rates of exchange on *New York* will advance as it has done in *Baltimore* and *Philadelphia*, or even higher, and in consequence that you will cease remitting, we have thought it highly inexpedient, even were it in our power, to undertake to protect your notes due in this month, &c.

Signed, HOWES, GODFREY AND ROBINSON.

(E.)

B. Godfrey & Co. in account with *Howes, Godfrey and Robinson.*

Dr.—1839,				
Oct'r.	23.	To whole amount of debit to this date,	$43,881	23
	24.	" cash paid their note to *Goodwin, Fisher and Spencer,*	483	00
	31.	" expenses collecting drafts,	1	20
Nov'r.	7.	" do. do. do.,	1	35
	13.	" exchange on *Philadelphia* funds,	127	50
	26.	" do. do. do.,	102	50
Dec'r.	28.	" do. do. do.,	128	33
1840,				
January	1.	" postage,	2	43
		" balance of interest,	62	59
			$44,790	13

1839,			Cr.	
Oct'r.	23.	By whole amount of credit to this date,	$35,223	84
	"	" certificate of deposite in *Marine Bank, Baltimore,*	762	00
	31.	" checks on *United States Bank, Philadelphia,* due Dec. 28,	1,509	81
Nov'r.	7.	" dft. *E. C. Delavan,*	134	90
1840,				
January	1.	" balance to debit this date,	7,159	58
			$44,790	13

Dr.—1840.				
January	1.	To balance this date,	$7159	58
		" certificate of deposite on *Marine Bank, Baltimore,*	762	00

This account was further stated until the 16th March 1841, when the balance due *H. G. and R.* was $4914.73; and on the 10th October 1842, when it was $2468.78.

(F.)

Baltimore, November 22, 1839.

Messrs. Howes, Godfrey and Robinson—Gentlemen: We received notice to-day from the *Merchants Bank*, where we keep our bank account, that they had this day received notice from the *Marine Bank*, that the signature purporting to be that of *J. Strodtmann* on the back of the certificate of deposite, issued subject to his order by the *Marine Bank*, is a counterfeit. The circumstances are these: *Mr. Joel Vickers*, of this city, deposited the money in the *Marine Bank*, in the name and for the benefit of *Mr. J. Strodtmann*, the *Marine Bank* giving a certificate of deposite, payable to the order of *J. Strodtmann*, on return of said certificate of deposite. We deposited it in the *Merchants Bank* on or about the 2nd of November instant, and that bank, in course of their usual exchange of checks and settlement of balances, sent said check in to *Marine Bank* the next morning as usual, and the amount thereof was duly passed to *Merchant Bank's* credit in settlement. *Mr. Joel Vickers*, who made the deposite in *Marine Bank*, has just received a letter from *J. Strodtmann*, dated *St. Louis, Missouri*, November 11, 1839, in which said *Strodtmann* advises of not having received any certificate of deposite, the receipt of which letter here has led to this developement. On comparing the endorsement of the certificate with *J. Strodtmann's* signature, in his letter, there appears no similarity. The *Marine Bank* did not know the signature of *J. Strodtmann*, never having taken it. It is customary to draw the money for checks on other banks, or have the checks endorsed by the teller before depositing said checks. Our clerk took this certificate of deposite to the *Marine Bank*, before depositing it in *Merchants Bank*, and asked the teller if it was necessary to have it endorsed like any ordinary check. The teller took the certificate, looked at it, and returned it to the clerk, saying it was not necessary to have it endorsed. We have, of course, assured the *Merchants Bank* we will hold them harmless in the premises, and we will look to you to make good that assurance. We wait your orders what course to pursue in regard to the *Marine Bank*. The *Marine Bank* demand of the *Merchants Bank*, that the amount be refunded; the matter stands open, waiting our action.

The endorsements are *J. Strodtmann* to *Godfrey & Co.*, or order, and by them to yourselves, or order, and by you to our order, and endorsed by us.

Your friends and servants, WELD & JENKS.

(G.)

New York, November 29th, 1839.

Messrs. B. Godfrey & Co., Alton.

Gentlemen:—Some time since we received from you a certificate of deposite in the *Marine Bank of Baltimore*, for $762. The same was made payable to the order of *J. Strodtmann*, and by him endorsed. On the 31st October, we sent the same to our friends, *Weld* and *Jenks*, of *Baltimore*, to collect and pass to our credit, intending to draw for it as favorable opportunities offered. *Weld* and *Jenks* collected the certificate through the *Merchants Bank*, where they keep their account, on or about the 2nd instant. On the 22nd instant, they advised us of having received notice from the *Marine Bank*, that the name of *J. Strodtmann* was a forgery, and the *Marine Bank* demands a return of the money from the *Merchants Bank*, and the *Merchants Bank* from *Weld* and *Jenks;* the latter write to us for instructions. It appears that *Mr. Joel Vickers*, who made the deposite for *Mr. J. Strodtmann's* benefit, has received a letter from the latter, dated *St. Louis*, November 11, in which he says he has received no certificate of the kind; upon which information it is concluded, that the signature is a forgery; we have refrained so far from giving any direction to change the position of the draft, on account of our not knowing what would be the proper course to take. We have made several inquiries, but find it to be such a novel case, that hardly any one can venture an opinion with any degree of certainty. *Mr. Shipman*, however, thinks that the *Marine Bank* should have the amount refunded, and then hold it, (the original deposite,) subject to the order of the proper owner. We shall be glad to have your advice upon the subject as early as possible, and in the meantime, we shall endeavor to not move in the matter, without it may be actually necessary, or without we may become convinced of the proper course to pursue.

We remain, &c.,

(Signed,) HOWES, GODFREY & ROBINSON.

Alton, 17*th December*, 1839.

Messrs. B. Godfrey & Co., Alton.

Dear Sirs:—The young man who sold you the check, or certificate deposite on *Marine Bank, Baltimore*, on 8th October last, came to live with me in March last, and remained with me till 18th September; his name was *John Strodtmann*, which I ascertained when he was subpœned last summer to attend a trial in *Alton*. On the 30th September, I settled with him, and hold his receipt, signed that day *J. Strodtmann*. He had intimated to my family, that he had money in the hands of a sister at the east, and about 8th October, he came to my house, stating he had received his money in a certificate of deposite, which was drawn to his order, and I had no doubt but it was correct. It was on the 8th October he sold the certificate to you, and if there be any thing wrong about it, it must be that there are two *J. Strodtmans*, for that was certainly his name, and I had no doubt of his being the identical *J. Strodtmann* in whose favor the certificate deposite was drawn.

(Signed,) Geo. W. Fox.

(H.)

Alton, 19*th December*, 1839.

Messrs. Howes, Godfrey and Robinson, New York.

Sirs:—Since ours of 25th October, &c., you will notice by the accompanying letter from *G. W. Fox*, (a very respectable farmer here,) that we bought the check of *J. Strodtman*, but as appears now, it is probable there were two Germans of that name. We do not wish it settled, except in accordance both with law and equity, and if you become convinced that it was our duty to know, that the *J. Strodtman* of whom we purchased, was the identical *J. Strodtman* alluded to in the certificate, and that it now proves that he was not the same, we suppose we must lose it. Your own judgment we commit it to, and shall be satisfied with any adjustment that is clearly right. If you have not forwarded our account current, please send it as early as possible, as we need on 1st January.

Yours truly, B. Godfrey & Co.

(I.)

Same as E, to debit of 1st January 1840.

The defendant then further proved, by *Daniel Sprigg*, its cashier, that on the day of the discovery of the forgery, upon the certificate of deposite given in evidence, *Mr. Smith*, of the *Marine Bank*, called upon the witness, with the certificate, and said that the endorsement of *J. Strodtman* thereon, was a forgery, and which was the first notice witness had, that said endorsement was a forgery, and that the party interested claimed a new certificate, and inquired as to the course the *Merchants Bank* would pursue; to this witness replied, that the defendant would certainly settle it, for that he, (the witness,) conceived it both legally and morally bound to refund the amount, but that *Weld* and *Jenks*, who deposited it, would be consulted, and their and witness' decision made known. That a messenger was sent to those gentlemen, and *Mr. Jenks*, of that firm came, and after being made acquainted with the circumstances, and the opinion of the witness, of the liability of the defendant to to the plaintiffs, and by consequence his to the defendant, he, (the said *Jenks*,) promptly differed in opinion, and stated that he did not consider the defendant or himself, legally or morally bound to return the amount. That said *Jenks* and the witness differed so widely in their views, that witness advised him, *Jenks*, to consult his counsel, and on being informed that he was out of town, witness proposed to send for the counsel of defendant, who witness was sure would confirm his views; this was agreed to, and witness accordingly sent for *Mr. Brown*, who appeared on the morning of the same day, and on relating the facts of the case to him, *Mr. Brown* said that witness was wrong, and *Mr. Jenks* right. That witness then stated what had taken place between him and *Mr. Smith*, including his, witness' promise to settle the amount of the certificate; and further said, it would be necessary for *Mr. Brown* to go over to the *Marine Bank*, and state to the said bank, that witness was in error in regard to the obligation of the defendant to refund. That witness also requested *Mr. Jenks* to acquaint the proper officers of the *Marine Bank* with his, *Jenks'*, unwillingness that the defendant should refund the amount of the

certificate until after he should hear from his *New York* correspondents, from whom the certificate had been received. The said witness further testified, that in any engagement he had with *Mr. Smith*, he had regard, and he thinks express reference to the assent of *Messrs. Weld* and *Jenks*, whom he considered bound to defendant, if latter was bound to the plaintiffs, and that if those gentlemen objected, he could not pay it, and that he certainly made no promise to *Mr. Smith* after their objection.

The defendant then further proved, by *George William Brown*, that upon being sent for by *Mr. Sprigg*, as proved by that witness, he gave the opinion as counsel of the defendant, that it was not legally bound to refund the amount of the certificate to the plaintiffs, and that *Mr. Brune*, who was upon that day president pro tem., in the place of *Mr. Swan*, who was out of town, agreed with witness in this opinion; that upon his, (witness,) giving this opinion, he went over on the morning of the same day, at the request of *Mr. Sprigg*, to the *Marine Bank*, and informed the president of the plaintiffs, and witness thinks also the cashier, that *Mr. Sprigg* was in error as to the liability of the defendant; and further, witness gave the plaintiff's president, and he thinks cashier, notice not to send in the certificate in the exchange lists upon the following morning, as the defendant, as then advised, would not pay the same. The same witness also testified, that he met at the *Marine Bank*, *Mr. Jenks*, of the firm of *Weld & Jenks*, who, while witness was in said bank, came there for the same purpose with himself, and on coming out of said bank, witness also thinks he met with *Mr. Smith*, to whom he made the same communication.

The defendant then further proved, by *Richard Dorsey, Jr.*, that in 1839, he was runner of the defendant, and that it was then the daily practice of the runners of the banks, to take to the other banks, a list or statement of the items, with the vouchers, upon which the banks so sending claimed a credit, and at the other banks to which these were taken, they received from the tellers thereof a list and vouchers, upon which credit was claimed by them, and that the balance of these items were struck, and if not objected to by either party

before 11 o'clock on the morning of the day on which the exchange was made, the balance struck was considered settled; that sometimes, according to the practice, the runner of the defendant would go to the bank of the plaintiffs, and make with the teller of that bank the exchanges, and sometimes the runner of the *Marine Bank* would come to the *Merchants Bank*, and make with the teller of the latter bank the exchanges; that it was the practice for the teller of the one bank, and the runner of the other, at the bank where the exchange was made, to substract the items of credit claimed by the one bank, from those claimed by the other upon the lists, and for the officer of the bank, against whom the balance appeared, to enter the balance in a book kept for that purpose, and for the runner, upon returning to his own bank, to take with him this substraction and result, together with the vouchers obtained at the other bank, for the examination of his own teller, and if the statement of credits was not objected to by 11 o'clock in the morning of the same day, the account was considered closed. The same witness also testified, that it was not the duty or business of the runners to examine the vouchers presented to them for credit at their bank, or to consider their correctness; that this was the business of the paying tellers, and that he, the witness, had no authority, while he was runner of the defendant, to bind it to the payment of money. The same witness further proved, that upon the morning of the 23rd of November 1839, after the exchanges had been made between the plaintiffs and defendant, in accordance with the usage of the banks, as proved by the witness, the certificate of deposite, given in evidence, was delivered to the paying teller of the defendant, *Mr. Gill*, together with the other vouchers, upon which the *Marine Bank* claimed credit. That *Mr. Gill* on seeing said certificate, immediately objected to receiving it, and to allow the credit claimed for it, and sent the witness to the *Marine Bank*, with the message, that he, (the said teller,) could not receive it. That witness carried said certificate to the teller of the *Marine Bank*, and demanded the amount thereof, but received for answer from said teller, that *Mr. Sprigg* had told *Mr. Littig* or *Mr. Smith*, that it might be returned in the check list to the *Merchants Bank*. That witness then returned to *Mr. Gill*, with

the certificate, and told him what *Mr. Miller* had said. That *Mr. Gill* gave the certificate back to the witness, and told him to tell *Mr. Miller*, that the *Marine Bank* must pay it, and that *Mr. Sprigg* could settle it with the *Marine Bank* himself. That witness accordingly returned the certificate to *Mr. Miller*, and obtained the amount for which credit had been refused, in order that *Mr. Gill* might adjust his account. That all this took place before 11 o'clock of the 23rd.

The defendant then further proved, by *William L. Gill*, that he is the paying teller of the defendant, and was such in 1839, and that on the morning of the 23rd of November, in that year, when the check list from the *Marine Bank* of the previous day given in evidence was brought to him, with the vouchers, upon which the *Marine Bank* claimed credit, the witness objected to allow a credit of $762, claimed on said list upon the certificate of deposite given in evidence. That witness wrote in pencil mark, the "not" upon said check lists opposite to said credit, to signify that he did not allow the same, and sent *Mr. Dorsey*, the runner, back with said certificate to the plaintiffs, to demand the amount of it from *Mr. Miller*. That *Mr. Dorsey* returned from the *Marine Bank*, and brought word from its officers, that *Mr. Sprigg* had said that it should be settled in this way; to this witness returned for answer by *Mr. Dorsey*, that this might be, but that witness could not receive it and allow the credit, and that the money must be paid. That the money was accordingly paid, and that these things took place before 11 o'clock of the said 23rd of November 1839. The said witness also proved, that by the custom of the banks, the tellers have until 11 o'clock of each day, to examine the items and vouchers upon which the other banks claim credit, and that by the custom, they may object to any items so claimed until that hour. That when any item is objected to, or not allowed, it is the custom to send the runner for the money to the amount of the item claimed, and when the money is thus obtained, the item is permitted to stand in the list and the account; but if the item is a large one, it is more usual to correct the item which gives more trouble. The same witness proved the practice of making exchanges between the banks, in the mode stated by the witness, *Dorsey*, and tes-

tified to the duties of the runners and tellers of banks, as given in evidence by the same witness, *Dorsey*.

The defendant then gave in evidence, the account between the defendant and *Messrs. Weld* and *Jenks*, from the 1st of November 1839, to the 1st of December of the same year, taken from the books of the defendant, shewing the balances upon each day during that period.

1839.

Nov. 1.	Amount in bank, - - -	$6,648 56
2.	Deposited, $400—1500—762, -	2,662 00
		$9,310 56
"	Checks, - - - - -	3,601 97
	Balance, - - - - -	$5,708 59
4.	Balance, - - - - -	6,041 11
5.	Balance, - - - - -	7,010 99
6.	Balance, - - - - -	7,361 80
7.	Balance, - - - - -	2,818 58
8.	Balance, - - - - -	1,916 74
9.	Balance, - - - - -	2,467 36
11.	Balance, - - - - -	2,011 79
12.	Balance, - - - - -	3,976 58
13.	Balance, - - - - -	2,376 58
14.	Balance, - - - - -	2,114 60
15.	Balance, - - - - -	802 10
16.	Balance, - - - - -	1,447 50
18.	Balance, - - - - -	411 78
19.	Balance, - - - - -	57 77
20.	Balance, - - - - -	500 83
21.	Balance, - - - - -	1,768 03
22.	Balance, - - - - -	6,696 03
23.	Balance, - - - - -	3,071 60
25.	Balance, - - - - -	3,435 60
26.	Balance, - - - - -	1,921 33
27.	Balance, - - - - -	121 33
28.	Balance, - - - - -	3,345 85
29.	Balance in Bank, - - -	$3,391 65

From which it appears, that upon the evening of the 19th of November, and the morning of the 20th of the same month, 1839, *Weld* and *Jenks* had drawn out all the money which they had in the bank of the defendant, including the amount credited to them upon the certificate given in evidence, except the sum of $57.77.

The defendant likewise gave in evidence the by-laws of the defendant.

The plaintiffs then proved by *Mr. Miller*, the plaintiff's paying teller, that upon the 23rd November, when he paid the amount of the certificate to *Mr. Dorsey*, viz: $762, as given in evidence by that witness, this witness paid it with the understanding, that the amount was to be settled on that day by the defendant, and that he made a memorandum to that effect, at the time on the check list given in evidence, and would not have paid the amount without this understanding. The same witness further proved, that the whole of said check list is in the hand-writing of witness, except the word not, written with a lead pencil thereon. The same witness also gave evidence of the practice of banks in the city of *Baltimore*, and their tellers, when an item is claimed by one bank, and objected to by another, to the same effect as proved by the witness, *Gill*.

The defendants then further proved by the witness, *Dorsey*, that he had no recollection of promising *Mr. Miller* to repay the money received from *Mr. Miller*, on the day it was received. That if he did make such promise, it was based upon the statement of *Mr. Miller*, that *Sprigg* said it should be settled; that the writing upon the check list was made by *Miller* in witness' presence.

The defendant prayed the court to instruct the jury as follows:

1. That if they shall believe, from the testimony in this cause, that on the 20th of September 1839, *Mr. Joel Vickers* deposited in the *Marine Bank* $762, and received therefor the certificate of deposite given in evidence in this cause, payable to the order of *J. Strodtman*, and for the purpose of remitting the said certificate to said *Strodtman*, who was then at *Saint Louis*, and after said certificate was issued, and before it was presented

for payment to said *Marine Bank*, *Philip Littig*, *Jr.*, the cashier of said bank, received from a brother-in-law of said *Strodtman* a signature of said *Strodtman*, which he, the said cashier, pasted in the signature or firm book of said bank; and if the jury shall further find, that said certificate was remitted to said *Strodtman*, but was never received by him, but fell into the hands of another person who passed under the name of *J. Strodtman*, that the said last mentioned *J. Strodtman* claiming to be the owner of said certificate, and the person to whom it was payable, forged thereon the name of *J. Strodtman*, and passed it for a valuable consideration to *Messrs. B. Godfrey & Co.*, of *Alton*, in the State of *Illinois*, who received the same *bona fide*, and without notice of said forgery. And if the jury shall further find, that said *B. Godfrey & Co.* endorsed and transmitted said certificate to *Messrs. Howes, Godfrey and Robinson*, of *New York*, who also, *bona fide* and without notice of said forgery, endorsed and transmitted it to *Weld and Jenks*, of *Baltimore*, who kept an account in the said *Merchants Bank*, in which account they were credited with said certificate on the 2nd November 1839, as cash, on endorsing and delivering said certificate to said bank, *bona fide*, and without having received notice of said forgery. And if the jury shall further find, that on the 4th day of November 1839, the *Merchants Bank*, *bona fide* and without having notice of said forgery, presented said certificate for payment at the *Marine Bank* and obtained the amount thereof. And if the jury shall further find, that neither the *Merchants Bank* nor *Marine Bank* discovered until the 22nd of November 1839, that the name of said *Strodtman* had been forged on the said certificate, then the plaintiff is not entitled to recover.

Rejected by the court, because it does not require the jury to find that defendants were holders for value.

2. That if they shall find the facts stated in the first prayer, the plaintiff is not entitled to recover, although they may further find, that on the 22nd of November 1839, the *Marine Bank*, on discovering the payment of said certificate to have been made under a forged endorsement, applied to the *Merchants Bank* to refund the amount, and that the cashier of the

latter bank replied, that he considered said bank legally and morally bound to return the money, and that said *Marine Bank* might send said certificate into the *Merchants Bank*, in the check list in the following morning, provided they further find, that after said declaration by the cashier, he was instructed by the counsel of said bank, and by the president pro tem. thereof, that in their opinion, the said bank was not bound to return said amount; and that he was also instructed by *Messrs. Weld and Jenks*, the previous endorsers on said certificate, that they had received it from their correspondents, *Howes, Godfrey and Robinson*, and that they, *Weld and Jenks*, would not consent that the *Merchants Bank* should pay back said certificate, unless compelled by law so to do, and that if said bank did so, they, the said *Weld and Jenks*, would not hold themselves answerable to said bank for the amount thereof; and provided the jury shall further find, that the said *Sprigg*, on the morning of the said day, the 22nd November 1839, after being so instructed by the counsel and president pro tem. of the bank, and *Weld and Jenks*, gave notice to said *Marine Bank* not to send in said check on the check list on the next morning, that the *Merchants Bank* could not, as then advised, return the money.

Rejected by court, because the prayer takes no notice of the time of the obligation of the *Marine Bank*.

3. That if they find the facts stated in the first prayer, and further find, that at the end of the 19th of November, and on the morning of the 20th of November 1839, and between the day when said certificate was deposited in said *Merchants Bank* by said *Weld and Jenks*, and credited to them as cash, and the day when said forgery was discovered and communicated to said bank; that they, the said *Weld and Jenks*, relying upon said credit, and in ignorance of said forgery, had drawn out all the money which they had in that bank, including the amount credited to them on certificate of deposite, except the sum of $57.77, then the plaintiffs are not entitled to recover, although they may further find, that on the 22nd of November 1839, the *Marine Bank*, on discovering the payment of said certificate to have been made under a forged endorsement, applied to the *Merchants Bank* to refund the amount, and that the cashier

of the latter bank replied, that he considered said bank legally and morally bound to return the money, and that said *Marine Bank* might send said certificate in to the *Merchants Bank* in the check list on the following morning; provided they further find, that after said declaration by the cashier, he was instructed by the counsel of said bank, and by the president pro tem. thereof, that in their opinion the said bank was not bound to return said amount; and that he was also instructed by *Messrs. Weld and Jenks*, the previous endorsers on said certificate, that they had received it from their correspondents, *Howes, Godfrey and Robinson*, and that they, *Weld and Jenks*, would not consent that the *Merchants Bank* should pay back said certificate unless compelled by law so to do, and that if said bank did so, they, the said *Weld and Jenks*, would not hold themselves answerable to said bank for the amount thereof; and provided the jury shall further find, that the said *Sprigg*, on the morning of the same day, the 22nd November 1839, after being so instructed by the counsel and president pro tem. of the bank, and *Weld and Jenks*, gave notice to said *Marine Bank* not to send in said check on the check list on the next morning, that the *Merchants Bank* could not, as then advised, return the money.

4. That if they find the facts stated in the 1st prayer, and if they shall further find, that at the end of the 19th of November, and on the morning of the 20th day of November 1839, and the day the said certificate was deposited in the said *Merchants Bank* by the said *Weld and Jenks*, and credited to them as cash, and the day when said forgery was discovered, communicated to said bank, they, the said *Weld and Jenks*, relying upon said credit, and in ignorance of said forgery, had drawn out all the money which they had in that bank, including the amount credited to them in said certificate of deposite, except the sum of $57.77, then the plaintiff is not entitled to recover any larger sum that the said sum of $57.77, with interest thereon, if the jury shall find interest to be due under the circumstances of this case.

5. The defendant further prays the court to instruct the jury, that if they find the facts stated in the first and second, and

third prayers of the defendant, and if they further find, that on and before the 23rd of November 1839, it was the usage and custom of plaintiff and defendant, for either plaintiff or defendant, to send in to the other on the morning of every day by its runner, the notes, checks and other instruments received by it on the previous day, on which it claimed credit from the other, and to receive in exchange, from the proper officer of the other bank, the notes, checks and other instruments received by the other bank on the previous day, on which it claimed credit from the bank so sending; and if they shall further find, that when the officers of said banks met to make the exchanges as aforesaid, it was the usage and custom for them to deduct the amount claimed by one bank from the amount claimed by the other, and for the officer of the bank, against whom the balance appeared, to enter said balance to the debit of said bank, and that it was not the business or duty of said runners to examine or decide upon the notes, checks and instruments on which credit was so claimed, but that the runner of the bank so sending, returned to the paying teller of his bank, the notes, checks and instruments on which the other bank claimed credit, with any entries which had been made by the officer of the other bank, and that it was the business and duty of the paying teller to examine the said entries, and also the check list furnished by the other bank, and the checks, notes and other instruments on which it claimed credit, and if he objected to allow the credit as claimed, to send back to the other bank, on the morning of the same day, and before 11 o'clock, A. M., the instrument which it objected to receive; and if the jury shall further find, as a part of the usage and custom of said banks, that where credit was improperly claimed on an instrument, and that instrument was sent back to the bank so claiming credit on it: the mode adopted for settling the accounts was for the bank which sent in an improper claim to pay over the amount to the other, on the re-delivery of the instrument, in order not to disturb the account as handed in, and by an alteration of recorded accounts; and if the jury shall further find, that on the morning of 23rd November 1839, the exchange between said banks was made in accordance with the usage of

said banks, and that among the instruments on which the *Marine Bank* claimed credit, was the certificate of deposite given in evidence in this cause, which was handed to the paying teller of the *Merchants Bank*, *Mr. Gill*, together with the other instruments on which the *Marine Bank* claimed credit; that *Mr. Gill* immediately on seeing said certificate, and before 11 o'clock of that day, objected to allow the credit claimed for it, and sent it back to *Mr. Dorsey*, the runner of the *Merchants Bank*, with the message that he could not receive it; that *Mr. Dorsey* carried said certificate to the teller of the *Marine Bank* and demanded payment for it, but received for answer from said teller, that *Mr. Sprigg* had told *Mr. Littig* or *Mr. Smith* that it might be returned in the check list to the *Merchants Bank;* that *Mr. Dorsey* returned again to *Mr. Gill* with the certificate, handed it to him, and told him what *Mr. Miller* had said respecting the understanding between *Mr. Sprigg* and *Mr. Littig*, or *Mr. Smith;* that *Mr. Gill* gave the certificate back to *Mr. Dorsey*, told him to tell *Mr. Miller* that the *Marine Bank* must pay it, and that *Mr. Sprigg* could settle it with the *Marine Bank* himself; that *Mr. Dorsey* accordingly returned the certificate to *Mr. Miller*, and obtained the amount for which he had objected to allow credit as aforesaid, for the purpose of adjusting the account according to custom, then the plaintiff is not entitled to recover, although the jury may find, that on receiving said money, *Mr. Dorsey* promised that it should be settled on that day.

Rejected by the court, because it takes no notice of the fact as to the time when the *Marine Bank* engaged to pay the amount to the brother-in-law, &c.

6. The defendant further prays the court to instruct the jury, that if they find the facts stated in the preceding first, second, third and fifth prayers, said facts do not amount to a payment to the *Marine Bank* by the *Merchants Bank*, of said certificate.

7. The defendant further prays the court to instruct the jury, that if they find the facts stated in the preceding first, second, third and fifth prayers, the promise made by *Mr. Dorsey*, and the promise or declaration made by *Mr. Sprigg*, if believed by

the jury, was without consideration, and not binding on the *Merchants Bank*.

But the court, (Le Grand, J.,) refused to grant the defendants said prayers, and each of them. To which refusal of the court to grant its said several prayers, and each of them, and to the opinion of the court overruling the defendant's objection to the admissibility of the statement of facts offered as evidence in this cause by the plaintiffs, and to the opinion of the court expressed in the reasons, and each of them, assigned by the court for its rejection of the first, second and fifth prayers of the defendants, and appended by the court to said prayers respectively; the defendant excepted.

It was agreed, that the printed by-laws of the defendant should be read in the Court of Appeals as if they had constituted part of the record.

The defendants appealed to this court.

The cause was argued before Archer, C. J., Spence and Martin, J.

By Brune and Brown for the appellants, who cited:

Baily on Bills, 318. *Solomons vs. The Bank of England*, 13 *East*, 136. *Fulton Bank vs. Phœnix Bank*, 1 *Hall*, 573, 576, 578. *Story on Agency*, 34, 104, 105. *Bosanquet vs. Dudman*, 2 *E. Com. Law R.*, 267. *Newson, ad'r vs. Douglass*, 7 *H. & J.*, 453. *Karthaus vs. Owings*, 2 *G. & John.*, 430. *Levy vs. Bank U. S.*, 1 *Binny*, 37. *Bank of the U. S. vs. Dunn*, 6 *Peters*, 59. *Bank of the U. S. vs. Jones*, 8 *Peters*, 16, 17. *Ang. and Ams. on Corp.*, 245, 246. *Key vs. Knott and wife*, 9 *G. & J.*, 342. 1 *Ste. N. P.*, 240. 43 *Law. Lib.*, 417. *Mahoney vs. Ashton*, 4 *H. and McH'y*, 322. *Sowerwein vs. Jones*, 7 *G. & J*, 340, 341.

By S. T. Wallis and David Stewart for the Appellees, who cited:

Greenlf. Evid., 186, 218 *Fulton Bank vs. Phœnix Bank*, 1 *Hall*, 572. *Talbott vs. Bank of Rochester*, 1 *Hall*, 297. *Wild vs. Bank of Passamaquoddy*, 3 *Mason*, 505, 506. *Fleckner vs. Bank U. S.*, 8 *Wheat*, 358. *Blake vs. Doherty*, 5 *Wheat*, 366. *Bank of Columbia vs. Patterson*, 7 *Cranch*,

299. *Smith vs. Mercer*, 6 *Taunton*, 80. 10 *E. C. Law*, 143. *De La Chaumette vs. The Bank of England*, 17 *E. C. Law*, 356. *Chitty on Bills*, 430, 432. *Sto. on Bills*, 104. *Sto. on Notes*, 465. 1 *Hill*, 287.

SPENCE, J., delivered the opinion of this court.

"At the trial of this case, the plaintiff, to maintain the issue on its part, offered to read in evidence to the jury the statement of facts agreed upon by the counsel of the parties, and submitted to the court upon the previous trial of the cause, to the admissibility of which, as evidence in this trial, the defendant objected; but the court over-ruled the objection, and permitted the said statement to be read in evidence to the jury by the plaintiffs, to which the defendant excepted."

This judgment of the court is first for our revision in this case.

We know of no legal objection to this statement of facts going in evidence to the jury, as the admissions of the parties of the facts therein set forth. The case of *Van Wart vs. Wolley and others*, 21 *Eng. Com. Law Rep.*, 366, is so entirely analogous as not to be distinguished upon principle.

The Court of Appeals, on the former trial of this cause, decided, "that if the case stated showed that the appellee, the *Merchants Bank*, was a *bona fide* holder of the certificate for value paid, the appellant, the *Marine Bank*, would not have been entitled to recover."

The county court were right in rejecting the first, second, third, fourth and fifth prayers on the grounds assigned in the opinion of the Court of Appeals, namely, that to enable the *Merchants Bank* to prevent the *Marine Bank* from recovering, it must shew itself to be a *bona fide* holder for value of the certificate. It is true, that the hypothesis of the third, fourth, and fifth prayers, each of them, present the fact, that on the 19th day of November 1839, *Weld* and *Jenks* had drawn out of the *Merchants Bank* all the money which stood to their credit, with the exception of $57.77; but it is equally true, that there was evidence to the jury, that on the 22nd day of November 1839, the day on which the forgery was discovered, and the

demand made on the *Merchants Bank* to refund the money, there was standing to the credit of *Weld* and *Jenks*, on the books of the *Merchants Bank*, a balance of $6696.03.

It could not be successfully contended, that if at the time this forgery was discovered, and the demand made on the *Merchants Bank* to refund to the *Marine Bank* the amount paid on the certificate, *Weld* and *Jenks* had withdrawn from the *Merchants Bank* the balance standing to their credit; that the *Merchants Bank* would not then have been holders of the certificate *bona fide*, and for value. *Fulton Bank vs. Phœnix Bank*, 1 *Hall's Rep.*, 573. But, if *Weld* and *Jenks* had received credit on the books of the *Merchants Bank* for the amount of the certificate, that entry was not conclusive upon the *Merchants Bank*, they were not concluded thereby from correcting their account when the forgery was discovered, on the 22nd November 1839, if they had funds of *Weld* and *Jenks'* in their possession, adequate to that purpose. It was, as it stood, evidence *prima facie* against the *Merchants Bank*, but not conclusive. *Garland vs. Salem Bank*, 9 *Mass. Rep.*, 408.

The county court erred in rejecting the defendant's sixth prayer, as there was no evidence in the cause, of the payment by the *Merchants Bank* to the *Marine Bank* of the certificate.

We are also of opinion, that the county court erred in refusing the defendant's seventh prayer.

"The cashier of a bank, possessing no incidental authority to make any declarations binding the bank, not within the scope of his ordinary duties: so if the cashier of a bank should promise to pay a debt which the corporation did not owe, and was not liable to pay, or should admit forged bills of the bank to be genuine, the bank would not be bound by such promise or admission, unless it had authorized or adopted the act." *Storey's Com. on Agency, page* 104, *sec.* 115 *and Gloucester Bank vs. Salem Bank*, 17*th Mass. Rep.*, 1.

From the view which we have taken of the opinion given by the Court of Appeals, on the former trial of this cause, we are of the opinion, that the *Merchants Bank* cannot, in this

case, successfully resist the recovery by the *Marine Bank*, and therefore affirm the judgment.

ARCHER, C. J., delivered the following dissenting opinion:

I am of opinion there ought to be a *procedendo* in this case. If the *Merchants Bank* was entitled to retain the money which was paid to it on the forged certificate, by the *Marine Bank*, provided the *Merchants Bank* could show, that she was a *bona fide* holder, and for a valuable consideration, I cannot conceive upon what principle she can be precluded from reposing on the title of the *Alton House*, which according to the proof, was a fair and *bona fide* holder for a valuable consideration, and when the subsequent holders were either acting as agents in the collection, or were *bona fide* holders for a valuable consideration, having no notice whatever of the forgery, or of any fact that could put them upon the enquiry.

It is my opinion that the Court of Appeals never meant to decide any proposition opposed to these views, and I account for the peculiar phraseology of the court's opinion when the case was in this court before, from the fact, that in the case then stated, the *Merchants Bank* neither set up, or offered to set up the title of the *Alton House*, the *New York House*, or the title of *Weld and Jenks*, but rested solely on her own title.

The money, when received by the *Merchants Bank* was, in my judgment, received for the benefit of the *bona fide* holder for a valuable consideration of this certificate, and that she bore the character of agent in the transaction, an agency merely of collection, and to deny the *Merchants Bank* the legal right to retain the money is in effect to say, that no matter in what condition, or under what circumstances the forged draft was taken; such holder, if he endorses the draft, even for collection, shall lose the money, although the same shall have been paid on presentation.

JUDGMENT AFFIRMED.

Isaac and Joseph M. Rogers *vs.* Henry Scarff and Others.—*June* 1845.

In 1828, a trustee, under decree, made a sale of land to *H*, who he reported as the purchaser, and the sale was ratified. The purchase money was in fact paid by *S*, who went into possession, and so remained. *H* was his agent, and bought for him. In 1834, *H* executed a lease of 14 acres of land to *W*, for the purpose of raising iron ore, and agreed, that should the ore run out on the 14 acres, *W* should have four more, whenever he saw proper, adjoining the same. The ore running out, *W* claimed to have the four acres on the land in the possession of *S*, adjoining the leased premises. Held: that *S*. had an equitable estate in the land in controversy; that *W* had constructive notice sufficient to put him on enquiry; and that *H* could not convey to him, or his assigns, any estate in the adjoining part claimed.

Appeal from the Court of Chancery.

The bill in this cause was filed on the 27th April 1840, by the appellants, and alleged, that on or about the 6th October 1834, one *John Withers* being about to establish a furnace for making iron on *Deer* creek, near a place called the *Rocks of Deer Creek*, with a view to obtain a supply of iron ore for said furnace, entered into a contract with one *Thomas Hope*, who was anxious to have a furnace erected in said county, by which it was agreed, between the said *Hope* and *Withers*, that the latter should have the exclusive right of digging and taking away iron ore, and from fourteen acres of land, for the period of one hundred years, for which said *Withers* was to pay the yearly rent of fifty dollars. It was also agreed between said parties, that in the event of a failure of iron ore on the said fourteen acres, the said *W.* was to have any four acres of land adjoining the said fourteen acres, which the said *H.* then had, at the same rate of rent of compensation, for the purpose of digging, raising and procuring iron ore; and it was further agreed, between the said *H.* and *W.*, that the latter should have the right to take, at his election, all their iron on the lands of said *H.*, at the same rate of compensation, provided the said eighteen acres should be exhausted at any time within the period of one hundred years, the term of said lease and agreement; that the said agreement or lease, was reduced to writing, and signed, sealed and duly acknowledged by the said *H.*, and

and duly recorded; that after the said agreement was executed, between the said *H.* and said *W.*, to wit, on the 8th October 1834, the said *W.* not having sufficient capital to erect and carry on his contemplated furnace, induced your orators to become partners in the same; and also in a forge then erected at the same place; and the said *furnace* was to be erected, and sold and transferred to your orators, two undivided third parts of the said forge and site for said furnace, and the water power and lands appertaining to the same; and also assigned on said last mentioned day, to your orators, two undivided third parts of said lease or agreement, so made as aforesaid, with said *Hope*, and all the lands, mines, rights, privileges and property, embraced within the provisions of the same; that afterwards, the said *W.* sold and transferred all his remaining interest in said iron works to your orators, and on the 28th March 1835, the said *W.* assigned to your orators the remaining undivided third part of the interest and premises, and all the rights and privileges he acquired under and by virtue of the said lease or agreement, with said *Hope*.

And your orators further shew, that relying on the lands mentioned in said lease, as well the adjoining lands of the said *H.*, as the fourteen acres specifically described to furnish a supply of iron ore, they proceeded to erect, at great expense, a furnace to make iron, and to provide all the necessary teams, fixtures and machinery requisite to the working and carrying on of a furnace; and also proceeded to dig and raise iron ore on the said fourteen acres of land, specifically described as aforesaid. But your orators state and aver, that from the examinations they have made, and from all the means of judging within their reach, they feel assured and convinced that there is no iron ore on a considerable portion of the said fourteen acres, sufficiently near the surface of the land to be accessible, at any expense, that it would be justifiable to incur in procuring iron ore; that they have now been working the mine on the said fourteen acres for about four years, and have so far been able to procure from the same a sufficient quantity of iron ore to supply their said furnace, but they have apprehensions that the iron ore on said fourteen acres will run out. In fact your

orators state, that the iron ore, on said fourteen acres may be exhausted in a very short time, but they cannot so state positively, because from the nature of the thing, it is impossible to determine with accuracy how much mineral of that description may be concealed in the said fourteen acres, still from all the means of judging within their power, there is good reason to apprehend that a full and continuous supply for their said furnace, cannot be afforded by the said fourteen acres, and if the supply of iron ore should fail, your orators would lose the large amount of capital they have invested in their said iron works, as it would not be practicable, as your orators believe, to procure iron ore for their iron works, from any other place than the lands comprised within the terms of said lease or agreement, there being in fact no sufficient quantity of ore at any place within a practicable distance, within the knowledge of your orators; that with a view to avoid delay, in giving to the said *H.*, or those claiming under him, the benefit of the rent for the other portions of land, besides the fourteen acres comprised within the said lease, they have offered, and requested the said *H.* to lay off, according to the terms of said lease, the four acres mentioned in said lease, to adjoin the said fourteen acres; and also to lay off the lands of the said *H.*, at the time of the execution of said lease, sixteen acres in addition to the said four acres, and have offered to pay rent for the same, according to the terms and conditions of said lease or agreement. But the said *H.* refuses to do so, and now one *Henry Scarff* pretends to claim to own, under a contract with said *H.*, a part of the land embraced in said lease or agreement, of which pretended claim, if it existed at the the time of the execution of said lease or agreement, or at the time of the assignment of the same to your orators, no notice whatever was communicated to your orators, nor had they any notice whatever of the existence of any such pretended claim; that the said *Henry Scarff* pretending as aforesaid, to claim a part of said lands, under and through the said *H.*, not only refuses to permit your orators to dig for, and raise iron ore on the lands embraced by said lease or agreement, except the fourteen acres specifically described, but has actually given permission to

Christopher Geiger, Philip A. Small and *Samuel Small*, to raise iron ore on lands which belonged to the said *H.* at the time of making and assigning of said lease and agreement as aforesaid, and which adjoins the said fourteen acres, described as aforesaid; that your orators gave notice of their claim to said iron ore to the said *Henry Scarff*, and to the said *Christopher Geiger, Philip A. Small* and *Samuel Small*, but in defiance of said notice, and in prejudice of the rights of your orators, the said *H. S.*, and the said *C. G., P. A. S.*, and *S. S.*, are digging and raising iron ore on the lands adjoining said fourteen acres described as aforesaid, and which belonged to said *H.* at the time of the execution and assignment of said lease; and your orators are apprehensive that the said *S.*, and *C. G., P. A. S.*, and *S. S.*, will take from said lands all the iron ore which can by any practicable means be obtained therefrom, unless they are restrained from doing so by a writ of injunction, and that by so digging and removing said iron ore, they will do irreparable injury to your orators; that the said *H., S., C. G., P. A. S.*, and *S. S.*, sometimes pretend that the lands adjoining the said fourteen acres, described as aforesaid, did not belong to the said *H.* at the time of the execution and assignment of said lease or agreement, and at other times pretend that the said lease or agreement did not confer any right or interest in the iron ore, or in any other lands, except the fourteen acres aforesaid, all which pretenses your orators aver, are wholly unfounded; and they aver, that by the land records of said county it appears, that the said *H.*, at the time of the execution and assignment of said agreement, was seized and entitled to two contiguous tracts of land, situated in said county, the one called "*Hope's Pleasant Hills*," and the other the "*Widow's Care;*" and that the lease embraces within its provisions, all the iron ore on the said two tracts of land; and further, that the land in which the said *S.*, and the said *C. G., P. A. S.*, and *S. S.*, are now digging iron ore, is a part of the tract called the "*Widow's Care*," which belonged as aforesaid, to the said *H.*, at the time of the execution of the said lease, and the said assignments thereof. Prayer, that the said defendants lay off, or permit your orators to lay off, twenty acres of

land of the said two tracts, and that they execute a lease of the same, upon the terms and conditions specified in the said lease or agreement; for an injunction to surcease from digging any iron ore on the said tracts of land, called "*Hope's Pleasant Hills*," and "*Widow's Care;*" and from removing any iron ore from the same, until, &c.; and for subpœna and general relief, &c.

The plaintiffs exhibited with their bill:

"Articles of agreement made and concluded the 6th October 1834, between *Thomas Hope, Sr.*, of, &c., and *John Withers*, of &c. The said *T. H.*, for the consideration hereinafter mentioned, doth for himself, his heirs and assigns, lease unto the said *J. W.*, his heirs or assigns, the exclusive right of all the iron ore within the following lines, beginning at, &c., being a part of "*Hope's Pleasant Hills*," and containing fourteen acres, more or less, for the term of one hundred years, the said term to commence when the said *J. W.*, his heirs or assigns, first commences hauling said ore; the said *T. H.* doth allow free access to and from said ore, with free liberty of taking the same away, the most convenient way leading to the road that leads to the furnace, which *Hope* may direct. The said *J. W.*, his heirs or assigns, doth agree to pay *T. H.*, his heirs or assigns, the sum of fifty dollars per year for the said ore and privileges, to be paid at the end of each year. It is further agreed upon, by the parties above mentioned, that should the said ore not prove good, the said *J. W.*, his heirs or assigns, are at liberty to discontinue raising and hauling at any time; and also, the lease is then to stop until the said *J. W.*, his heirs or assigns, see proper to commence again. It is further agreed, that should the said *W.*, his heirs or assigns, discontinue raising said ore in the first year, they are to fill up the holes, and level the ground. The said *T. H.* further agrees, that the said *J. W.* may build a house for the accommodation of the miners, on the before mentioned lot; and it is further agreed, that should there be any lime stone in the said lot, the said *T. H.* is to have free liberty of quarrying and taking the same all away, but not interfering with raising said ore; and it is further agreed upon, by the said *T. H.*, his heirs or assigns, that should the ore run out

on the before mentioned fourteen acres, the said *J. W.*, his heirs or assigns, is to have four acres more, at the same rate, whenever he sees proper, adjoining the said fourteen acres. It is further agreed upon, by the said *T. H*, his heirs or assigns, that the said *J. W.*, his heirs or assigns, are to have the refuse of all the iron ore on the said *Hope's* land, at the rate before mentioned, provided the ore should run out in the before mentioned *eighteen* acres. For the true performance, &c.

THOMAS HOPE, (Seal.)
JOHN WITHERS, (Seal.)"

"It is further agreed by the said *Withers*, that should the ore run out on the above mentioned eighteen acres, he is to pay at the rate of thirty dollars per acre for all the land he digs and covers, not including the above mentioned eighteen acres on said *Hope's* farm. It is further agreed, the said *Hope* is to have the privilege of farming said land, by not interfering with the raising of said ore. THOS. HOPE, (Seal.)
JOHN WITHERS, (Seal.)"

This lease was acknowledged and recorded.

By indenture of 8th Oct. 1834, *J. W.* assigned two-thirds of his interest, under the lease from *T. H.* to the complainants. This indenture was also acknowledged and recorded; on the 28th March 1835, *J. W.* assigned his remaining one-third of said lease to complainants, also acknowledged, &c.

On this bill and its exhibits an injunction was ordered.

The answer of *Henry Scarff* admitted the exhibits filed with the bill, and alleged, that the complainants have not, as yet, erected upon said fourteen acres of land so leased by the said *H.* to *W.*, and assigned by *W.* to them, any furnace for the purpose of making iron; but he admits, that they have a furnace on *Deer* creek, about seven miles from said lands, and he admits, that the complainants have raised a considerable quantity of iron ore from said lot so leased by said *H.*, and used said ore in their furnace, but this defendant is not apprised of the quantity of ore so raised by the complainants, and this defendant does not know of any deficiency in the quantity of said ore still in the ground on said lot, and neither admits or denies that there is, or is likely to be any such deficiency, but leaves

the complainants to the proof thereof, if they deem it important to them. That he has heard, and admits it to be true, that the complainants have applied to the said *T. H.* for a lease of more lands, for the purpose of raising iron ore, but this defendant is not aware, and does not admit that the said *Hope* refused to make a lease to them of any of his lands. And this defendant, further answering, says, a certain *John Robinson* acting as trustee under a decree of *Harford* county court in equity, on the 12th November 1827, set up and exposed at public sale all the lands and premises in the proceedings in that case mentioned, being parts of several tracts of land lying in *Harford* county aforesaid, called "*Widow's Care*," "*Isles of Capree*," and "*Hope's Pleasant Hills*," containing 172 acres; and that the said *Thomas Hope*, for and as the agent of, and by the direction of this defendant, purchased the said lands and premises at the said sale for this defendant. And this defendant avers, that he hath paid the purchase money for the said lands and premises for himself, and with his own proper moneys; and he avers, that shortly after he made said purchase, and long before the said contract of lease hereinbefore mentioned, was made between the said *Hope* and *Withers*, he, this defendant went into possession of the lands and premises so bought by him from the said *John Robinson*, trustee as aforesaid, and he says that he hath ever since been, and still is, the sole owner and possessor thereof; but this defendant says, that he admits that he was not returned as the purchaser of said lands by the said trustee; and he admits that the said *T. H.* was returned as purchaser thereof, but he says that the said trustee hath never executed any deed therefor, either to this defendant or to the said *T. H.;* and this defendant denies that the said *T. H.* hath or ever had, any right or title, or interest or estate in the said lands and premises, or any part thereof. And this defendant further says, that the said *T. H.* is the owner and possessor of lands bounding on the estate so owned and possessed by this defendant, and that said *Hope* was the owner and possessor of such lands before and at the time he made said contract with said *W.;* and he admits that the said land so leased to the said *W.* by the said *H.*, adjoins and binds upon the lands so owned

and then occupied by this defendant as aforesaid; and this defendant denies that he ever pretended to own, or have any interest in the lands embraced in said lease from *Hope* to *Withers*. And this defendant further answering, says, that the complainants did pretend that the lands and premises so belonging to and possessed by this defendant were lands embraced within the provisions of said lease, and the said complainants did claim to have a new lease for a part of this defendant's estate upon the pretenses aforesaid; and this defendant says that about two years ago the complainants wanted to lease this defendant's lands from him, but that they could not agree upon the terms of a lease. And he admits that he refused to let the said complainants enter upon said lands as he had a right to do; and he admits that he refused to execute any lease therefor to the said complainants, unless the complainants would agree to the terms proposed by this defendant. And this defendant further says, that he did lease a part of his own lands unto the said *Christopher Geiger*, who acted for himself and for *Philip A. Small*, his co-partners, with permission to dig thereon for iron ore; and he admits that his said lessees did commence work on his said lands under his lease to them as aforesaid, and he says that his said lessees were stopped in their said work by the injunction issued, &c.

The answer of *Thomas Hope* also admitted the exhibits filed with the bill, and that the complainants have worked the said mines or ore bank, and have raised a considerable quantity of iron ore from out of the said lands so leased by him to the said *W.;* and this defendant says that there is no well founded reason for supposing that there is any deficiency of iron ore in said mines, and that said mines have not been exhausted. That on or about the 12th November 1827, a certain *John Robinson*, acting as trustee under the authority of a decree of *Harford* county court in equity, set up and exposed at public sale the lands and premises in the proceedings in that cause mentioned, being parts of several tracts of land situate and lying in *Harford* county, called "*Widow's Cure*," "*Isles of Capree*," and "*Hope's Pleasant Hills*," containing, &c., which lands adjoin the lot of ground, so afterwards leased by

this defendant as aforesaid, to said *J. W.* And this defendant further says, that at the request, and for the use and benefit of the said *Henry Scarff*, this defendant attended said sale, and purchased said lands so offered by the said *Robinson*, for the said *Henry Scarff*. And this defendant says, that shortly afterwards, and before this defendant made said contract with the said *Withers*, the said *Scarff* went into possession of the said lands so bought by this defendant for said *Scarff*, as aforesaid; and he says that he has understood and believes, that said *Scarff* has paid for said lands. And this defendant admits that he was returned by the said *Robinson* as the purchaser of said lands, but he says that he never claimed any interest thereon, or any right or title thereto, except that at one time a verbal agreement between said *Scarff* and this respondent, for a purchase by this respondent from said *Scarff* of a part of said lands, but not that containing iron ore, and said agreement was never perfected. That he always has been and still is willing to comply with his said contract made with said *W.;* but he admits that he has refused to make any lease of said *Scarff's* land to the said complainants. That said *W.*, before and at the time when said lease was made to said *W.*, well knew that the said *Scarff* was the sole owner and possessor of the lands now claimed by said complainants, and in controversy in this cause; and he says that he verily believes that the complainants, before and at the time when they so bought out the said *W.*, well knew that the said *Scarff* was the sole owner and possessor of the lands now claimed by the complainants, and in controversy in this cause. And this defendant says that he has heard, and believes it to be true, that the said *Scarff* has contracted with the defendants, *Geiger* and *Smalls*, for a lease of a part of his, the said *Scarff's* lands, for the purposes in the bill mentioned; and he admits that said *Geiger* and *Smalls* were at work on said lands, raising iron ore, when stopped by the injunction in this case, &c.

The answer of *Christopher Geiger*, agent and acting partner of *Philip A. Small and Samuel Small*, after admitting the contracts filed with the bill, says, that he has been informed and believes, and charges it to be true, that long before, and at the

time when said contract was made between the said *H.* and *W.*, the said *H.* and *H. S.* were the owners and possessors of adjoining lands in *Harford* county, aforesaid, each of them holding his estate separate and distinct from the other, and each holding his said estate without the other having any right, title, or interest therein. And this defendant, as acting partner, is further informed, and charges to be true, that the said *Henry Scarff* hath ever since been, and still is, in the sole and exclusive possession and enjoyment of this said estate. That on or about the 25th February 1840, he made a contract and agreement with the said *H. S.*, to lease from him fifteen acres of land, containing iron ore, and adjoining the ore bank of the said complainants, but lying altogether within the lines of said lands so owned and possessed by the said *H. S.*, and which had been so owned and possessed by him before and ever since the said lease from *H.* to *W.* And this defendant admits, that he did commence work upon the lands so leased to them as aforesaid, by raising iron ore from out of said lands as they had a right to do; and he says that they were so at work when they were, by the said complainants, wrongfully stopped by the injunction issued in this cause. And these defendants admit, that they refused to permit the said complainants to work the mines upon the lands so leased by these defendants as aforesaid; and they say that they have no knowledge of the other matters enquired of in said bill, &c.

The answer of *P. A.* and *S. Small* admitted the contract of *Geiger* in 1840, and denied all personal knowledge of the other matters.

After proof taken, at December term 1843, Bland, Chancellor, dissolved the injunction and dismissed the bill, on the ground that there was no evidence which showed, that the agreement of 6th October 1834 was intended to embrace any land, claimed by the defendant, *Henry Scarff.*

From this decree the complainants appealed.

The cause was argued before Archer, C. J., Spence and Martin, J.

By Otho Scott and J. Johnson for the appellants, and
By T. P. Scott for the appellees.

SPENCE, J., delivered the opinion of this court.

The record in this case discloses the following facts, viz: that the lease or agreement, under which this controversy originated, between *Thomas Hope* and *John Withers*, was executed on the 6th day of October, 1834. It contains a stipulation, that in the event, the ore on the fourteen acres of land, described in the lease, should run out, *Withers* was to have four acres more at the same rate, whenever he saw proper, adjoining the fourteen acres mentioned in the lease.

It also appears, by the report of *John Robinson*, who was trustee under a decree of *Harford* county court to sell the land in controversy, that he did make sale thereof some time in the year 1828. His report was made to *Harford* county court, at March term 1828.

The trustee, in his report, returned *Thomas Hope* the purchaser of the land so by him sold. But we think the evidence establishes, beyond controversy, that *Thomas Hope* purchased the land for *Henry Scarff*, as his agent; that *Scarff* paid all the purchase money for the land; went immediately into possession, and has, from that time to the present, continued in possession, exercising all the rights of ownership, incident to an absolute estate. Let it be remembered, that this possession, payment of purchase money, and exercise of ownership, commenced in the year 1828. The lease from *Hope* to *Withers*, was made in 1834. We are entirely at fault to find a ground for the argument, that *Withers* was a lessee for valuable consideration, without notice. Can there remain a doubt, after the proof of the above recited facts, that he, *Withers*, had, if not actual, at least constructive notice, sufficient to put him upon enquiry?

In conclusion, we are of opinion, that at the date of the lease between *Hope* and *Withers*, in 1834, *Henry Scarff* had the equitable estate in the land in controversy, and that *Thomas Hope* did not, and could not, convey any interest or estate in or to the same.

DECREE AFFIRMED WITH COSTS.

Margaret Dugan, John Smith Hollins and wife, and Robert S. Hollins and wife, *vs.* John S. Gittings and wife, et al.—*June* 1845.

Under the act of 1830, ch. 185, sec. 1, orders or decrees passed in an equity case, previous to the final decree, are open for revision in the appellate court by force of the very words of that act.

The act of 1841, ch. 11, repeals that branch of the 1st sec. of the act of 1830, ch. 185, which denies to a party the privilege of appealing from any decree which was not final in its character, and restored to him the right of an immediate appeal from the *particular decrees enumerated* in that section; yet it leaves in force the other branch of that section, as to the effect of an appeal from a final decree when taken.

The act of 1841, ch. 11, did not contemplate a total repeal of the act of 1830, ch. 185. It repealed only that portion of the latter act which had abridged the right of appeal.

Statutes in *pari materia*, are to be construed together.

A latter statute on a given subject, not repealing an earlier one, in terms, is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter.

Where a father, in 1798, knew that his daughter had entered into an engagement of marriage, of which he approved, and being a man of fortune, declared it to be proper and just that he should make an advancement, in contemplation of marriage, to her, as he had done to another daughter; and accordingly, a short time before her marriage, announced his determination to give her a house, and in fact did verbally give it to her in fee, as a marriage portion. It appeared also, that the house was prepared for his daughter, and she placed in possession of it by her father, as her own property; that these arrangements were known to the intended husband, and the marriage there celebrated; that the parties there resided for some months, and from that period, the daughter, to the time of her death, in 1806, was in the enjoyment, under the gift, of the rents of the property, with the knowledge and consent of her father; sometimes paid to her by him, and sometimes by his agent. Held: that these circumstances constitute a mass of proof upon the *factum* of the gift, which it is impossible to resist.

A mere verbal, voluntary, executory agreement, although founded on the meritorious consideration of love and affection, cannot be enforced by a court of equity, and the party who made it may, at his will, violate or abandon it.

An agreement made by a father with his daughter, in contemplation of her marriage, by way of advancement, and as a marriage endowment, followed by her marriage as then contemplated, has for its support a valuable consideration. It cannot be revoked by the father. The marriage is a consideration which vests the interest in the donee against all the world. The daughter is regarded as a purchaser, as much so, as if she had paid for the property an adequate pecuniary consideration.

The delivery of the property by the father to the daughter, under such circumstances, in pursuance of the gift and fulfilment of the condition on which it was to attach, withdraws the contract from the reach of the statute of frauds.

Performance of the consideration, and change of possession under the contract, are the two ingredients, which when combined, have always been regarded as relieving a parol agreement from the operation of the statute of frauds.

The answer of the widow and executrix of a father, who had made an advancement to his child of a *first* marriage, of which the respondent had no personal knowledge, is not within the general rule, that it can only be disproved as an answer responsive to the bill, by two witnesses, or by one witness with strong corroborating circumstances.

An answer which does not admit the allegations in a bill, puts the complainant on proof thereof, and leaves him to sustain them as they can.

Where a father made a parol gift of real property to a child, in contemplation of marriage, and executed the same by delivery of possession, the court will not infer, that subsequently, another piece of property was substituted by consent, the conduct of the father to the time of his child's death, and after the period when the alleged substitution was supposed to have been made, being entirely inconsistent with the existence of such consent.

The husband is tenant by the curtesy of the equitable inheritance of his wife.

D, the father, in 1798, made a parol gift of real property to his daughter, as a marriage endowment, and delivered her possession. Her husband in 1801, became a bankrupt, and assigned all his property to *D*. In 1806, the daughter died, leaving three infant children. In 1818, the husband died. To the period of the husband's death, *D* must be regarded as occupying the property in the character of assignee of the husband, and then, for the first time, the statute of limitations was put in motion by his adverse claim.

In the year 1820, one of the daughters came of age, and married in 1821. In 1822, another daughter married, and came of age in 1825. The son died unmarried. The bill was filed in 1837, before the lapse of twenty years from the death of the complainant's father, the bankrupt, to procure a conveyance of the house and lot, and an account and payment of the rents received by *D*, since the death of their mother, in 1806, against the heirs and devisees, and executrix of *D*. Held, that in the application of the statute of limitations:

1. That as to the daughter who married before she came of age, it was not competent for her to avail herself of any other disability than that of infancy, the disability which existed at the time her cause of action accrued.

2. A party is protected by the disability which exists at the time his right of action *first* accrued, because the case is within the express terms of the statute.

3. If there are in existence several disabilities, at the time the right of action accrues, the statute does not begin to run until the party has survived them all.
4. The operation of the statute cannot be prevented by cumulative disabilities. If subsequent disabilities were to be regarded, the right of action might be saved for centuries.
5. A court of equity, in applying the statute of limitations analogically, would not permit the claim of a party to real property to be affected by any devolution of time short of that which would have barred him at law in action of ejectment.
6. If the parties, complainants here, could have recovered their rents from *D*, in an action of *indebitatus assumpsit*, or it was a case of concurrent jurisdiction, at law or in equity, then the act of limitations, in relation to personal actions, would have been a bar after three years.
7. The rents and profits in this case could not have been recovered at law, they would be payable only upon the successful assertion of title to the property, and as the contract resting in parol would have been void at law, no recovery in that court could have been obtained; the doctrine of part performance is peculiar to the chancery courts, and is not regarded at law, as taking a case out of the statute of frauds. Hence limitations are no bar to the recovery of rents and profits in equity, under the circumstances of this case.

The case of *Caborne vs. Godfrey*, 3 *Ves.*, 517, overruled as to the plea of limitations.

Where an executrix alleges in her answer that she has received the assets of her testator, as shown by her return to the *Orphans* court, which she is prepared, when required, to produce, this is not an admission of the sufficiency of assets; and as the complainants failed to prove such sufficiency, this is a failure on their part to establish, by proof, a material allegation in their bill. The appellants, the defendants in equity, are not precluded by the act of 1832, ch. 302, from raising that question in this court; and under that act the cause is therefore remanded.

APPEAL from the equity side of *Baltimore* county court.

The bill was filed on the 3rd January 1837, by *John S. Gittings* and *Eleanor A.*, his wife, and *James C. Gittings* and *Rebecca N.*, his wife, and alleged, that *Cumberland Dugan* was in 1798, seized and possessed of a very large real and personal estate. At this period the said *C. D.* had three children, one of whom, his daughter *A. D.*, was then addressed by *J. P.*, who afterwards became her husband; and another daughter, *Margaret Dugan*, who was then also addressed by *William R. Smith*, who afterwards became her husband, to whom respectively the addresses of said gentlemen were made,

with the knowledge and approbation of their said father, and the proposals of marriage of the said *J. P.* to the said *A. D.* having been accepted, and her marriage being in contemplation, her said father, by way of advancement to her, and as a marriage portion, before the marriage gave to and put the said *A.* into possession of a valuable lot and dwelling in the city of *Baltimore*, which said dwelling the said *C. D.* caused to be built for the reception of his said daughter, and her intended husband, and which said house and lot are now enjoyed and owned by said *A.* Your orators further state, that the said *C. D.* having thus advanced his said daughter *A.*, and his said daughter *M.*, then receiving with his, the said *D's* approbation, the the addresses of the said *W. R. S.*, he, the said *D.*, deemed it proper and just to make a provision for his said daughter *M.*, by way of advancement, and in contemplation of her marriage with said *S.*, similar to that which was thus made for said *A.;* and that accordingly, in the same year, and whilst his said daughter was receiving the addresses of said *S.*, with the consent of said *D.*, and in contemplation of their marriage, he, the said *D.*, with the knowledge of said *S.*, and before his marriage with the said *M.*, agreed to give, and actually gave to said *M.*, in fee for her settlement and advancement in life, and as a marriage portion, and as a provision for herself and husband, and the issue of their intended marriage, if any, the property situated and being in the city of *Baltimore*, being a three story brick house and lot, on the west side, &c. That the said *S.*, at the period of his addresses and marriage, and when said advancements and gift were made to his intended wife, was himself possessed of a considerable estate, exceeding in value the property so advanced to his said intended wife; that the said *M.* was, by her said father, put into the actual possession of the property so advanced to her by him, he putting her into possession thereof as her own, under said gift and advancement; that she, the said *M.*, being so put into possession of said property as her own by her said father, with the knowledge of said *S.*, the dwelling house on said lot was before her marriage, prepared and completely furnished in part by said *S.*, and in part by said *D.*, for the residence of said *M.*

and said *S.*, upon the celebration of their marriage; and that he, the said *S.*, so united in preparing and furnishing the same, with the knowledge of the said gift of the said property to the said *M.*, and believing her to be entitled to the same. That on all occasions after the said gift, and particularly whilst the said house was so being furnished and prepared, the said *C. D.* spoke of the said gift to his daughter *M.*, and declared that it was intended as an advancement for her, and was made in contemplation of her said intended marriage, and that when the marriage was about to be celebrated, the said *M.* was put into possession of the same notoriously as hers, and her marriage with said *S.*, was with her father's knowledge and approbation, there celebrated on the 2nd October 1798; and the said *M.* and her said husband, immediately thereupon took possession and occupied said property, as the property of said *M.*, under said gift and advancement, and continued to occupy the same for a considerable time, as her property, and not only without paying any rent to said *D.*, but without any claim or pretence of title to the same by the said *D;* but on the contrary, they, the said *M.* and her said husband, holding, claiming and enjoying the same with the knowledge and consent of her said father, as the property of said *M.*, under the gift and advancement aforesaid; and your orators further charge, that the said *M. S.* and her husband, having so taken possession of and occupied said property, continued to occupy the same after the period of their said marriage, until sometime during the year 1799, when they removed therefrom; but after their said removal from it, and until the death of the said *M.*, which occurred in 1806, she, the said *M.*, continued to claim and hold, and receive and enjoy, with the knowledge and consent of her said father, all the rents, profits and issues of the said property, as belonging to her, the said *M.*, under said gift and advancement; and your orators also state, that not only during all this period, and they so claim the same, with the knowledge of the said *D.;* but also, that in several instances, the rents of the same were collected and paid to the said *M.*, as belonged to her by the agent of said *D.*, and that in several other instances, the said *D.* himself, collected and paid over

the rents of said property to his said daughter, as belonging to her, and that during the whole lifetime of the said *M.*, the said *D.* never pretended to have any title or claim whatsoever to the said property, but on the contrary, always acknowledged the same to be property of his said daughter *M.;* and your orators further state, that the said *M.* became the mother of three children by the said *S.*, to wit: *John M. Smith*, who is dead, intestate and without issue; your orator, *Eleanor A. Smith*,, now the wife of your orator, *John Gittings;* and *Rebecca A. Smith*, now the wife of your orator, *James C. Gittings;* and the said *Eleanor A.* and *Rebecca A.*, your complainants, are the only heirs at law of the said *Margaret* and said *William R. Smith;* that before the death of said *Margaret*, the said *William R. Smith* had become unfortunate, had failed in business, and ceased to pay any attention to this property up to the period of his death, which occurred on the 10th June 1818; that immediately upon the death of *M.*, the said *D.* took the charge and management of said property on *Market Space*, rented the same out to tenants and collected the rents of the same from that period up to the day of his death, placing the money thus received among his own money, using and employing the same as his own, and has never rendered any account to your orators therefor. And your orators further state, that the said *C. D.* hath also, by his last will and testament, among other things, devised and bequeathed as follows: "I give, devise and bequeath to my friend, *Isaac McKim*, his heirs and assigns, the following property, in trust for my grandchildren hereinafter named, as follows, that is to say, my three story brick house and the lot on the west side of *Market Space* or *Cumberland Row*, in the city of *Baltimore*, situate about, &c., which pieces of property I hereby devise to the use of my two grandsons, namely, *C. D. Hollins*, son of my daughter *Cordelia Margaret*, and *Cumberland Dugan Hollins*, son of my daughter *Rebecca*, their heirs and assigns as tenants in common to be conveyed to them by my trustees, when they respectively attain the age of twenty-one years, and in the meantime to pay over the rents, issues and profits of the same to my wife during the term of her natural life, if she should live so long;

and on the event of her death, before my said grandchildren attain to the age of twenty-one years respectively, to pay over the rents, issues and profits thereof to my daughters, *Rebecca Hollins*, *Cordelia* and *Margaret Hollins*, equally, and in further trust to convey the same in fee simple, should my said grandsons, or either of them, die before the said age of twenty-one; that is, one moiety to the use of my daughter *Cordelia Margaret*, in fee, if her son dies before the said age, and the other moiety to the use of my daughter *Rebecca*, if her said son should die before he attains the said age." Which will has been duly admitted to probat, the said *Cumberland* having, since the making thereof, died, and your orators are ready to produce a duly authenticated copy thereof, &c.; charge that by the said will, the said *C.* appointed his wife, *Margaret Dugan*, his sons, *Hammond Dugan*, and *Frederick James Dugan* and *William McKim*, executors of his said will, but that the three last having renounced the execution of said will, letters testamentary have been granted to the said *Margaret*, alone, who hath received into her hands assets more than enough to pay all claims due by the deceased, *C. D.* And your orators further state, that *E. A.* and *R. A.*, two of your orators, were married whilst minors, and have remained under coverture ever since, and that *Rebecca Dugan*, daughter of said *C.*, is married to *John S. Hollins*, and that *Cordelia Margaret*, another daughter of said *Cumberland*, is married to *Robert S. Hollins*. And you orators further state, that during the life time of said *C.*, and within three years before the filing of this bill, your orators often time applied to him for a conveyance of said house and lots, and for an account and payment of the rents and profits by him received therefor, and since his death they have applied to said executrix of said *Cumberland*, and the other defendants therefor, all of which reasonable requests have been constantly refused by them, all of which actings, &c.

Prayer, that the defendants may be decreed to convey the said property mentioned and described as given to said *M. S.*; that said defendants be forever enjoined from intermeddling with

or claiming title to the same, and that the said executrix of said *Cumberland Dugan* may account, &c.

The joint and several answers of *Margaret Dugan*, *John Smith Hollins* and *Rebecca Hollins*, his wife, *Robert Smith Hollins* and *Cordelia Margaret Hollins*, his wife, alleged it to be true, that *Cumberland Dugan* was, in the year 1798, seized and possessed of a considerable real and personal estate, the value of which these respondents believe to be greatly exaggerated by the said complainants in their said bill of complaint. That at that period, the said *C. D.* had three children, viz, *A.*, who intermarried with *J. P.; M.*, who intermarried with *William R. Smith;* and *George Dugan;* and that as these respondents are informed, and believe, *Margaret's* intermarriage with the said *William R. Smith* was before the intermarriage of *A.* with the said *J. P;* that they are unable to state the precise dates of either of said marriages; that the house and lot fronting on *Gay Street*, &c. These respondents, further answering, deny that the said *C. D.*, by way of provision or advancement, or in contemplation of the intermarriage of his daughter *Margaret*, with *William R. Smith*, in the year 1798, or at any other time, upon any other consideration, gave or agreed to give to the said *Margaret*, in fee for her allotment and advancement in life, as a marriage portion or provision for herself and husband, and the issue of their intended marriage, if any, the property being and lying in the city of *Baltimore*, being a three story brick house and lot, on the west side of *Market Space*, or *Cumberland Row*, situate about thirty feet north of *Pratt Street*, and between, &c., having a front of about twenty-seven feet, and a depth of about sixty-five feet, together with a lot in the rear thereof, purchased by the said *Cumberland Dugan* of *John O. Donnell*, particularly described in said bill of complaint. That after their intermarriage, the said *W. R. S.* and *M.* his wife, occupied, for a short period, a house and lot on *Cumberland Row*, belonging to said *C. D.*, but whether the house and lot described by the complainants in their said bill of complaint, these respondents neither admit nor deny, but they aver, that it was so occupied by the consent and sufferance of the said *C. D.*, without their

paying any rent therefor, and that they went into the possession of the same as the property of *C. D.*, and not as their own. They aver, that the title to said property never was in the said *W. R. S.*, or *M.*, his wife, but that the same was, and remained in *C. D.*, who never parted, or intended to part therewith, and that the occupancy or possession of this or any other house on *Cumberland Row*, belonging to said *C. D.*, by said *W. R. S.*, and *M.*, his wife, never was regarded by said *D.* as a possession connected with title, or a claim of property, but as permissive on the part of said *D.*, for the temporary accommodation and convenience of his daughter. These respondents further answering, deny that after the said *W. R. S.*, and *M.*, his wife, gave up the possession of said property, and until the death of said *M.*, (which they admit to have occurred in the year 1806,) she, the said *M.*, continued to claim, hold, receive and enjoy, with the knowledge and consent of her father, *C. D.*, the rents, profits and issues of said property, as belonging to the said *M.*, under any supposed gift or advancement, or that the said *Cumberland Dugan* ever admitted her right to receive such rents and profits; on the contrary these respondents affirm, that the said *C. D.*, at all times, as well during the occupancy by said *W. R. S.* and wife, of the house and lot on *Cumberland Row*, as afterwards, not only up to the death of *Mrs. Smith*, but up to that of his own death, continued to exercise all proper acts of ownership over said property, by paying taxes, receiving all rents, making all repairs, alterations, &c., the same as he did in regard to all other property of which he was possessed, and to which he had title; and that not only did the said *Cumberland* so exercise all acts of ownership over said property, with the knowledge and without the molestation of said *W. R. S.* and wife, or either of them, under any pretended claim of title, but that from the period of the death of said *Margaret*, till that of the death of *W. R. S.*, her husband, which occurred in the year 1818, the said *C. D.* continued to manage and deal with said property as his own, without any question of his right so to do by the said *W. R. S.*, and without any pretence that the same had been given to the said *Margaret* by the said *C.* These respondents, further answer-

ing, insist for further defence upon the provisions of the *statute of frauds and perjuries* as a sufficient answer to the claim of property asserted by the bill of complaint of the said complainants. These respondents admit the death of *W. R. S.*, and *M.*, his wife, and that the complainants are their only living children and heirs at law. They likewise admit the death of *C. D.*, and the execution of his testament and last will which has been duly admitted to probate, and that the devise of the property herein before referred to, is correctly recited by the complainants in their said bill. They also admit, that by said will, the said *C. D.* appointed his wife, *Margaret Dugan*, and his sons, *Hammond Dugan*, *Frederick James Dugan*, and *William McKim*, executrix and executors, the three last of whom have renounced said trust, and that letters testamentary upon said estate have been granted to said *M. D.* alone, by the *Orphans* court of *Baltimore* county, who has received the assets shewn by her returns to said *Orphans* court which she is prepared to produce whenever the same may be required. These respondents are unable particularly to state, the amounts received by *C. D.* for the rents of the property referred to in this answer, nor the persons from whom, or the times when the same were received. These respondents have no knowledge of the applications alleged to have been made by the complainants to the said *C. D.*, for a conveyance of said property, and a payment of the rents and profits thereof, but are aware that on or about the 30th day of January 1834, *U. S. Heath*, *Esquire*, on the part of the complainants, addressed to the said *C. D.* a note, now herewith produced, marked A, and which they pray may be regarded as a part of this their answer, to which the said *C.* returned the answer now likewise produced, herewith marked B, which they pray may be also regarded as a part of this their answer; and they further insist upon *the lapse of time and the statute of limitations* as a defence to the pretended claims and demands set up by the complainants in their said bill. These respondents are not aware, nor do they believe that *C. D.* kept books of any kind, in which charges are made against his daughters, *Abigail* and *Margaret*, not having found in any of the books of the de-

ceased, accounts opened or against the said *A.* and *M.*, but this respondent, *M.*, who as executrix, is in possession of the books of the deceased, is prepared to produce.

The exhibits filed with the bill, showed, that on the 30th January 1834, the complainants sought of *Cumberland Dugan* an amicable settlement of their rights, which he declined; denying their right to any part of the property claimed by them.

After the filing of answers, much proof was taken, and a variety of deeds, records, and other documents, were also produced in evidence; all of which are sufficiently stated in the preceding bill and answer, and in the opinion of this court.

On the 4th March 1841, *Baltimore* county court, (R. B. Magruder, A. J.) decreed, that the complainants are entitled to a specific performance of the contract, entered into by *Cumberland Dugan*, with his daughter, *Margaret Dugan;* and that the defendants, the devisees of the property in question, to wit: *C. D. Hollins*, infant son of *Rebecca Hollins; C. D. Hollins*, infant son of *Cordelia M. Hollins; J. S. Smith; John S. Hollins*, and *Rebecca*, his wife; *R. S. Hollins*, and *Cordelia*, his wife; by a good and sufficient deed, convey to the female complainants, in *fee simple*, the house and lot, &c.; a trustee was appointed, to convey for the infants.

And that *Margaret Dugan*, one of the defendants, widow of the said *C. D.*, account with for, and pay over to the complainants, the rents and profits of the said property, so decreed to be conveyed, so far as she may have received the same, from the time of the death of the said *C. D.*, to the present time, with interest; that *J. S. Smith*, the trustee of *R. H.*, also account and pay over rents which he has, or had in his hands when he became a party to this suit. The decree then directed an audit and account. Payment, also, by the present tenants, of what they still owed, and also an account with *M. D.* as executrix of *C. D.*, from death of *W. R. Smith* to death of *C. D.*, with liberty to take further proof, and a reservation to the infant defendants to shew cause, after arrival at age, within, &c.; and for costs against *M. D.*

The judge assigned as reasons for the decree:

1st. The proof is clear, unequivocal, and uncontradicted, that *Cumberland Dugan* intended to give, and did give to his daughter *Margaret* the house and lot in *Cumberland Row*, described in the proceedings of this cause, in contemplation of marriage, and as a marriage portion for his said daughter.

2nd. That he put her in possession of the said house and lot before the marriage, and that the marriage actually took place in said house, and that she and her husband occupied the said house and lot until the spring of 1799, and that afterwards her father, from time to time, for many years, paid her the rents of the said house, and treated, and declared, and considered the house as her property.

3rd. That he never set up any right or title to the house, but on the contrary, a short time before *Mrs. Smith's* death, withheld the payment of the rents, upon the ground that he had a claim against the husband of his said daughter, a reason and ground entirely consistent with, and in affirmance of, the fact of a gift to his daughter, as an advancement and marriage portion.

4th. That although the said agreement was not in writing, yet the above facts demonstrate such a part execution of the contract as takes the case out of the statute of frauds, because the putting in possession, the payment of rents, and the withholding, for a short period before his daughter's death, the rents for the reason assigned by *Dugan*, are all facts, taken together, which would not have been done unless on account of the agreement.

5th. That not to decree a performance, and to permit the statute of frauds to operate, would enable *Dugan* to perpetrate a gross fraud upon the marriage parties.

6th. That the payment of rents by *Dugan* to his daughter, *Mrs. Smith*, for so long a time after her removal from the house in question, to the *Rope Walk*, forbids all idea of any substituted gift of another house in lieu of the one originally given.

7th. That there is no evidence to show, that the *Rope Walk* property was a gift by *Dugan* to *Mrs. Smith*, his daughter, in substitution of the house and lot in *Cumberland Row*. The

exception taken by the complainants' counsel, and filed among the proceedings, to that portion of *Mrs. Bosley's* answer to the third cross-interrogatory, which states, that *Mr. Cumberland Dugan* gave a deed of the *Rope Walk* property to his daughter, *Mrs. Smith*, being sustained by the court, that portion of her testimony being clearly inadmissible.

8th. That there is nothing in the circumstances of this case to show, that the claims are of so stale a nature, or that there has been such laches on the part of the complainants in not sooner bringing their suit, as that it ought not to be, at this late period, heard in a court of equity, nor ought the statute of limitations to be a bar. The relations between *Dugan* and his son-in-law, *Wm. R. Smith*, the father of the female complainants, would, in my judgment, prevent any charge of laches up to the death of *Smith*, even if a legal representative of *Smith* were here claiming, and at that period some of the children were of tender years, and all of them were under twenty-one; *Eleanor*, one of the female complainants, was but a few months above the age of twenty-one when she married, and she is covert, still her husband being alive; and one of the complainants, *Rebecca*, the other female complainant, was married under twenty-one years, being only about eighteen years, and at the time of the bringing of this suit her husband, *James C. Gittings*, was alive, and united with her as a com-complainant; laches in bringing forward this claim at so late a period, does not apply to a case like this, which may be regarded as one between parent and child, and should be looked at in that view by the judicial eye. To such a case, laches does not apply. 3 *Dessauss.*, 517, 519. *Caborne vs. Godfrey*.

9th. The reason for taxing the costs to the defendant, *Margaret Dugan*, as executrix of *C. Dugan*, is that the trustee for the infant defendants, and the other defendant's rights not to be burdened with costs, if no injustice be thereby done to other persons, and as the whole controversy was with the testator, *C. Dugan*, commencing with his refusal in his lifetime to recognise the rights of the complainants, and continued by a devise of the property under his will, and the defence of this

suit having been made in affirmance of his acts and intentions, the costs ought, perhaps, properly to fall upon his estate.

The auditor of the court reported several accounts:

Account A.—Charged two-thirds of the rents, from 10th Dec. 1818, the time of the death of *W. R. S.*, with interest to the 10th Dec. 1841. The interest was charged upon each year's rent as it fell due, and the account amounted to $10,870.81.

The auditor reported that he only allowed two-thirds of the rents, because the personal representatives of *John Smith*, the deceased brother of *Rebecca* and *Eleanor*, were not before the court.

He also reported, that the sum of $3601.12, for rents due since the death of *Mr. Dugan* to 12th Oct. 1840, with like interest as in the preceding item. Other accounts were stated, and various exceptions taken to them. The county court affirmed account A, and awarded payment by *Margaret Dugan*, as executrix of *C. D.*, to each of the daughters of *Mr. Smith*, one-half of the sum of $10,870.81, with interest from 10th Dec. 1841, from which decree the defendants appealed to this court.

The appeal on behalf of the infant children of *Rebecca* and *Cordelia Hollins*, represented by *John Spear Smith*, was dismissed.

The cause was argued before Dorsey, Spence and Martin, Judges.

By John Nelson and Reverdy Johnson for the appellants, and

By McMahon and Glenn for the appellees.

Martin, J., delivered the opinion of this court.

It appears from the record in this case, that the original decree was passed by *Baltimore* county court, as a court of equity, on the 24th of March 1841. The final decree ratifying and confirming the auditor's report, was pronounced on the 25th of March 1843. An appeal was taken on the part of all of the defendants from this decree, on the 10th of October of the same year, but the appeal which was entered by the infant

defendants having been dismissed, the case is presented upon the appeal alone of *Mrs. Margaret Dugan, John Smith Hollins and wife*, and *Robert S. Hollins and wife*.

In this condition of the case, the counsel for the appellees have contended, that the decree of the 24th of March 1841, not having been appealed from within the period prescribed by the act of 1785, ch. 72, is not now open for objection in this court; that the decree is conclusive as to the matters settled by it, and it must be regarded as establishing the appellee's right to the property decreed to be conveyed; and also to an account of the rents and profits thereof, from the death of *William R. Smith*, leaving open only the questions, as to the proper statement and adjustment of that account. The proposition stated by the counsel for the appellees is, that as the decree of the 24th of March 1841, was one from which the appellants had the right to appeal, they were obliged to exercise the privilege, upon the authority of the case of *Strike against McDonald*, 2 *H. & G.*, 260; and having failed to do so in due time, the matters adjudicated by that decree, are to be regarded as conclusively established, and not now open for objection or examination in this court.

By an Act of Assembly of 1830, ch. 185, sec. 1, it is provided, "that no appeal shall hereafter be allowed from any decree or order of the chancery court, or county court, sitting as a court of equity, unless it be a final decree, or order in the nature of a final decree; and that upon appeal from a final decree or order, in the nature of a final decree, within the time limited by law for such appeals, all previous orders and decrees passed in the cause, shall be open in the appellate court, in the same manner as if such previous orders or decrees had been as heretofore appealed from, within nine months from the time of the passing of the same." These are the provisions of the act of 1830, and it is clear, that if that clause of the first section, which declares, that upon an appeal from a final decree, all previous orders and decrees passed in the cause, shall be open in the appellate court, is still in force, the right to inquire into the correctness of the decree of 1841, belongs to the appellate court, for it has been conferred by the express terms of the

statute. The language of the act has been made so comprehensive, as to embrace *all* orders or decrees, whether they are matured decrees, professing to establish all the rights in controversy between the parties, as in the case of *Strike against McDonald*, 2 *H. & G.*, 260, or mere interlocutory and preparatory orders, as in the case of *Snowden against Dorsey*, 6 *H. & J.*, 114. If the order or decree in dispute, was passed in the cause, and was previous to the final decree, it becomes open for revision in the appellate court, by force of the very words of the statute. The only question, therefore, that can arise on this branch of the case is, whether this clause of the first section of the act of 1830, has been repealed by the act of 1841, ch. 11?

By the first section of that act, it is declared, "that so much of the first section of the act of 1830, ch. 185, as takes away the immediate right of appeal from any decree or order of the court of chancery, or any county court, for the sale, conveyance or delivery of real or personal property, be, and the same is hereby repealed; and that from any such decree or order heretofore, or hereafter to be passed, the right of an immediate appeal is hereby given;" and we are satisfied, that although the legislature have directly repealed that branch of the first section of the act of 1830, which denied to the defendant the privilege of appealing from any decree which was not final in its character, and restored to him the right of an immediate appeal, from the particular decrees enumerated in its first section, they have left in force that part of the section which declares, that on an appeal from a final decree, all previous orders shall be open in the appellate court, in the same manner as if such orders had been, as heretofore, appealed from.

It is perfectly obvious, from an inspection of the act of 1841, that the legislature did not contemplate a total repeal of the act of 1830. To what part then of the act of 1830, did they propose to apply the repealing power? An answer to the question is to be found in the words of the first section, which declare, that *so much* of the antecedent act as takes away the immediate right of appeal from any decree of the court of chancery, for the sale, conveyance, or delivery of real or personal pro-

perty, is repealed; and it is manifest, that the object was to repeal only that portion of the former act, which had abridged the right of appeal. The Court of Appeals had decided, in the December term 1840, in the case of *Lee against Pindall*, 11 *G. & J.*, 364, that the object of praying an appeal, and filing an appeal bond, under the *proviso* contained in the first section of the act of 1830, was not to effect an immediate removal of the cause to the Court of Appeals, but that it merely suspended the execution of the decree, for the sale or delivery of the specific property, until a final decree was passed, when the whole case might be brought up for review in the appellate court; and the legislature, believing that a party ought to possess the right of appealing immediately from decrees of this nature, repealed, in this respect, the act of 1830, without, however, imposing on the defendant the obligation of appealing from such decree, or depriving him of the right of having it reviewed in the appellate court, on an appeal from the final decree, as secured to him by one of the provisions in the former act.

There is, we think, no ground for contending, that the provision in the act of 1830, under which the appellants have claimed the right to subject to the review of this court, the decree of the 24th of March 1841, has been repealed, either directly or by implication. These two statutes being in *pari materia*, are to be construed together. A latter statute on a given subject, not repealing an earlier one, in terms, is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter. 20 *Pick.*, 410. 21 *Pick.*, 297. 9 *Cow.*, 437. 5 *Hill*, 221. 11 *Coke*, 63. *Dwar. on St.*, 675.

Having disposed of this preliminary point, and considering the whole case as properly before us, we proceed to an examination of the grounds, on which the appellants claim a reversal of the decree, pronounced by the county court.

The first point made in the cause, and that which was pressed with most emphasis, is, that the appellees have entirely failed to establish by evidence, the existence of any such contract or gift, as is charged in the bill, and that *Cumberland Dugan*

never gave or promised to give, the property mentioned in the bill, to the mother of the appellees, as a marriage endowment.

The bill alleges, that the late *Mr.* and *Mrs. Smith* were married in the month of October 1798. That the alliance was contracted with the knowledge and the approbation of *Mr. Cumberland Dugan*, the father of *Mrs. Smith*. That *Mr. Dugan* was also the father of *Mrs. Purviance*, and that after she had become engaged, he, in the autumn of the same year, gave to her as a marriage portion, the house in which the *Judge* and *Mrs. Purviance* now reside. That he was at this time a man of ample fortune. That having advanced one daughter, and the other being at the time addressed, with his approbation, *Mr. Dugan* deemed it proper and just, to make a similar provision for his daughter, *Margaret*, by way of advancement, and in contemplation of her marriage with *Mr. Smith*. That accordingly, a short time before the marriage of *Mrs. Smith*, he announced his determination to give to her the house in *Cumberland Row*, (the subject of the present controversy,) and that he in fact, did give to her, in fee, the house in question, a short time before the celebration of the marriage, as a marriage portion. That this establishment was prepared for the reception of his daughter, and she was placed in possession of it, by *Mr. Dugan*, as her own property. That these arrangements were known to the husband. That their nuptials were celebrated there. That they continued to reside in this house until the spring of 1799, and from that period to the time of the death of *Mrs. Smith*, she was in the enjoyment under the gift, of the rents arising from this property, with the knowledge and consent of her father, and that the rents were sometimes paid to her, either by *Mr. Dugan* or his agent.

The object of the bill is two-fold. First, to procure a conveyance of the house and lot in controversy, to the complainants, from the devisees of *Cumberland Dugan;* and as consequent upon the assertion of a title to the property, an account and payment of the rents received by *Mr. Dugan*.

These are the material statements and allegations of the bill, and we are satisfied that they have been fully established by the testimony in the cause.

The delivery of the possession of this house to *Mrs. Smith*, prior to her marriage, as her own property under the gift. The fact that she resided there with her husband until the spring of 1799, and then removed, only that *Mr. Smith* might prosecute with more convenience, the affairs of a partnership, which had been concerted by *Mr. Dugan*, between *Mr. Smith* and the brother of *Mrs. Smith*, in the business of the *Rope Walk*. The payment of the rents issuing from this property by *Mr. Dugan*, or his agent, until within a few months before the death of *Mrs. Smith*, and then withheld that they might be applied by *Mr. Dugan* to the discharge of some responsibility in which he had become implicated for *Smith*. The declarations of *Dugan*, before the marriage, and after it had been solemnised, that he intended to give, and had given this property to his daughter as a marriage advancement or portion, and his declaration after the death of his daughter, "that it was her property, and should go to her children," constitute a mass of proof upon the *factum* of the gift, which it is impossible to resist.

It is true that a mere verbal, voluntary, executory agreement, although founded on the meritorious consideration of love and affection, cannot be enforced by a court of equity, and the party who made it may, at his will, violate or abandon it. In *Pennington vs. Gittings*, 2 *G. & J.*, 217, this court said: "The consideration of natural love and affection is sufficient in a deed, but a mere executory contract that requires a consideration, cannot be supported on a consideration of blood, or natural love and affection; there must be something more, a valuable consideration, or it is not good, and cannot be enforced at law, but may be broken at the will of the party. And being void at law for want of a sufficient consideration, chancery cannot sustain and enforce it." 2 *Story's Com. Eq.*, *Sec.* 987.

But this is not the character of the contract now under examination. Having been made in contemplation of, and as a marriage endowment, it has for its support a valuable consideration. It cannot be revoked or violated at the will of the party who made it. The marriage was a consideration which vested the interest in the donee against all the world; she is to be re-

garded as a purchaser, and as much so as if she had paid for the property an adequate pecuniary consideration, 1 *Jno. Ch. Rep.*, 271. It cannot be necessary to cite authorities to maintain the proposition, that marriage is to be regarded as a valuable consideration. In *Buchanan vs. Deshon*, 1 *H. & G.*, 192, the Court of Appeals, in speaking of a marriage contract, say, that it was founded upon a consideration which was valuable, and one upon which the law looks with a favorable eye. The same doctrine is announced by the Supreme Court in the case of *Magrew vs. Thompson*, 7 *Pet.*, 333. The late *Mr. Justice Story*, stating in the opinion of the court, delivered by him, "that marriage, in contemplation of the law, is not only a valuable consideration, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution."

We are, also, very clearly of opinion, that the delivery of this property by *Mr. Dugan* to his daughter, in pursuance of the gift, and the fulfilment of the condition on which it was to attach, by the consummation of the marriage, extracted this contract from the reach of the statute of frauds. The consummation of the marriage, in a case like this, is to be considered as equivalent to the payment of the purchase money in a pecuniary contract, in both cases the consideration is discharged. There is to be found then, in this case two ingredients, which when combined, have always been regarded as relieving the parol agreement from the operation of the statute,—performance of the consideration, and a change of possession under the contract. *Drury vs. Conner*, 6 *H. & J.* 292 2 *Stor. Com., Sec.* 763. 1 *Sug. V.*, 143. 18 *Ves.*, 328.

Before we leave this branch of the case it is proper to state, that we do not consider the answer of *Mrs. Margaret Dugan* as within the general rule, that an answer asserting a fact responsive to the bill can only be disproved by two witnesses, or one witness with strong corroborating circumstances. The doctrine on this subject is stated with great perspicuity and precision by the late chief justice of this court, in the case of *Pennington vs. Gittings*, 2 *G. & J.*, 215, and is directly applicable to the question before us. He says:—"A plaintiff, by calling on the

defendant to answer the allegations in his bill, upon oath, makes the answer evidence; and as one witness would only be equivalent to the answer, and the plaintiff to prevail, must have preponderating proof, it is necessary that he should have another witness, or circumstances in addition to the testimony of one, in order to turn the scale. But looking to the answer as testimony only, it must be treated as any other testimony, and the weight of it must, from the very nature of evidence, in some degree depend on the fact it asserts. Therefore, when an executor or administrator answering in his representative character, alleges facts of which he can have no personal knowledge, it can but amount to an assertion of his impressions, and his speaking positively cannot alter the character of his testimony, merely because it comes in the shape of an answer, but must be allowed its due weight only, and is not entitled to the full influence of the answer of a man, speaking of facts which may be within his own knowledge. And upon the obvious principle, that when a witness asserts a fact, of which further developments in the course of his examination prove him to be in a situation to prevent his having a full knowledge of the subject, his testimony is not entitled to the weight of that of a man swearing to facts which may be fully within his knowledge. The answer in this case is of that description, and is not, we think, such as to require the testimony of two witnesses, or one with circumstances to out weigh it. But as it does not admit the allegations in the bill, it puts the complainant on proof, and leaves him to sustain them as he can, unembarrassed by any supposed responsive features of the answer." 9 *Cran. R.* 160. The principle which withholds from an answer of this description, the weight to which it would be entitled, if it came from the party to the transaction, cannot be changed by the period at which the complainant may have filed his bill, no matter by what motives he was influenced in postponing the institution of his suit, because the answer being in its nature testimony only, the influence to be attached to it must always depend on the fact it asserts, and the position of the party who makes the assertion.

Assuming that the gift claimed by the appellees was originally made, and so made and executed as to have been valid in law against the donor or settlor, we do not think that the proof in the cause shews, as has been maintained by the counsel for the appellants, the substitution of another property, (described as the *Rope Walk*,) in place of the house in contest, by the consent of all parties concerned, even if the appellants could avail themselves of this ground of defence under the pleadings in the cause.

Mrs. Smith died in 1806. The deed from *George Dugan* to *Judge Purviance*, as her trustee, conveying the property described as the *Rope Walk*, was executed on the 1st of June 1803. And yet we find *Cumberland Dugan* paying to his daughter the rents of the property in *Cumberland Row*, to within a few months of her death, and after her demise affirming that the house belonged to her, and should go to her children. These facts are entirely inconsistent with the idea, that there was, with the consent and understanding of all parties, a substituted gift of another property for that which was originally given.

It appears, also, that so far from the independent matter thus relied on, having been advanced by the answer as a ground of defence, the argument presupposes the existence of an agreement and gift, which the answer directly repels, and it may perhaps be doubted, upon the case of *Boon vs. Chiles*, 10 *Pet.*, 209, whether it would have been competent for the appellants to have availed themselves of this defence, under the pleadings in the cause. We do not mean, however, to determine this question, and overrule this objection to the decree, on the ground that there is no evidence to support it.

The propositions which we propose next to examine, are those presented by the pleas of the statute of limitations and lapse of time. This defence has been taken by the answer, and the enquiry is, has it been sustained?

It is clear, that *William R. Smith* was entitled to a life estate, as tenant by the curtesy, in this equitable inheritance of his wife. 1 *Rop.*, 19. 5 *Mad. R.*, 249. And the principle is now established by the case of *Morgan against Morgan*, 5

Mad. R., 248, that the husband is tenant, by the curtesy, of the equitable inheritance of his wife, notwithstanding a direction to pay the rents and profits to her separate use, during the coverture; the receipt of the rents and profits being a sufficient seisin in the wife. The Vice Chancellor adopted the opinion of *Lord Hardwicke*, in *Roberts against Dixwell*, 1 *Atk.* 603, as containing the true doctrine on this subject.

The interest of *William R. Smith*, in this estate, passed to *Cumberland Dugan*, as his assignee, by force of the deed of the 13th of August 1801, and *Dugan* must be regarded as occupying the property, in this character, until the death of *Smith*, in 1818. It is manifest, therefore, that no cause of action had accrued to the appellees, in respect to this estate, until 1818, when their father died. At this period, then, for the first time, the statute of limitations was put in motion by the adverse claim of *Dugan*.

It appears that one of the appellees, *Mrs. Eleanor Gittings*, was of age in July 1820, and married in the spring or winter of 1821; and that *Mrs. Rebecca Gittings* attained the age of twenty-one years in 1825, and was married in 1822. And notwithstanding, in the case of *Mrs. Rebecca Gittings*, there was *coverture* before the termination of her infancy, it was not competent for her to avail herself of any other disability than that of *infancy:* the disability that existed at the time her cause of action accrued. The doctrine upon this subject, was correctly stated by the counsel for the appellants, and not disputed by their opponents. The rule is this: a party is protected by the disability that exists at the time his right of action first accrued, because the case is within the express terms of the saving clause in the statute. For the same reason, if there are in existence several disabilities, at the time the right of action accrues, the statute does not begin to run until the party has survived them all. But it is now firmly established, that you cannot prevent the operation of the statute by cumulative disabilities. 3 *J. Ch. R.*, 138. 4 *Mass. R.*, 182. 7 *Serg. and R.*, 210. *Mercer vs. Selden*, 1 *How.*, 52. The whole doctrine was examined with elaborate care by Chancellor *Kent*, in the case of *Demarest against Winkoop*, 3 *J. Ch. R.*,

138, and the opinion pronounced by him, has been received as containing the correct rule upon the subject. If subsequent disabilities were to be regarded, the right of action might be saved for centuries; and the statute would be rendered incapable of accomplishing the important purposes for which it was passed.

The bill was filed on the 3rd of January 1837, and as between that period and 1818, when the right of action accrued, twenty years had not elapsed, a right of entry in the plaintiffs would not have been tolled, had they been clothed with the legal title, and a court of equity, in applying the statute of limitations analogically, would not permit the claim of a party to be affected by any devolution of time, short of that which would have barred them at law, in an action of ejectment. 10 *Wheat.*, 152. We think, therefore, the appellee's claim to the property is not barred, either by limitations or lapse of time.

It has, however, been contended by the counsel for the appellants, that although the appellees are not barred, so far as their claim for the property is concerned, yet they are barred by limitations and lapse of time, from recovering any rents, except such as were received by *Mr. Dugan*, within three years before the filing of the bill. The ground upon which this argument has been placed is, that it would have been competent for the plaintiffs, on the case made in their bill, to have recovered the rents from *Dugan*, in an action of *indebitatus assumpsit*, and it was a case, therefore, of concurrent jurisdiction, between the courts of equity and law.

It is true, that the statute of limitations, in all cases of concurrent jurisdiction at law and in equity, is equally obligatory in each court. In such cases, courts of equity do not act so much in analogy to the statute, as in obedience to it. They apply the statute as it would have been applied at law. In *Murray against Coster*, 20 *J. R.*, 583, *Chief Justice Spencer* said:

"All, however, I mean to deduce from this consideration is, that it is impossible in a case like this, where there was ample remedy at law, that the change of the *forum* should produce a

change in the rights of the parties; for beyond all doubt, had the respondents sued at law, the appellants could have pleaded the statute; whether successfully or not, remains to be considered. I have, therefore, no hesitation in saying, that in a case where there is a concurrent jurisdiction in the courts of common law and of equity, the rule must be the same, and the statute of limitations may be pleaded with the same effect in the one court, as the other."

The same doctrine is announced by Chancellor *Kent*, in 7 *J. C. R.*, 124, *Kane vs. Bloodgood*, where he says:—

"I understand this proposition to mean, that if the party has a legal title, and a legal right of action, and instead of proceeding at law, resorts to equity; instead of bringing his action of account, or detinue or case for money had and received at law, files his bill for an account, the same period of time that would bar him at law, will bar him in equity. This is the principle that pervades the cases." 2 *Sh. and Lef.*, 607.

This being the principle by which courts of equity are governed, in the application of the statute of limitations, if the counsel for the appellants could have maintained the proposition, that the appellees had a remedy at law for the recovery of the rents, the statute would have operated as a positive bar.

But it is clear, we think, that the rents and profits of this property could not have been recovered at law, by the appellees, either in *indebitatus assumpsit*, or any other form of action.

It is evident, that in a case like this, the right to the rents would be consequent only upon the successful assertion of title to the property, and as this contract, resting in parol, would have been absolutely void at law, no recovery in that court could have been obtained. The doctrine of part performance is peculiar to the chancery courts, and is not regarded at law as taking a case out the statute of frauds. *Jackson vs. Pierce*, 2 *J. Rep.*, 222.

Another insuperable objection to the maintenance of an action at law, would have been, that in that court the plaintiffs could not have stood upon their equitable title.

In *Mathews vs. Ward*, 10 *G. & J.*, 456, the Court of Appeals declared, that the doctrine of *Lord Mansfield*, in

3 *Bur.*, 1901, has been receded from, and that it had been repeatedly decided, that the legal estate shall prevail against the equitable title. In *Doe vs. Wroot*, 5 *East*, 138, *Lord Ellenborough* says: "We can only look at the legal estate; if the devisees have an equitable interest, they must claim it elsewhere, and not in a court of law." 7 *East.*, 22. 2 *John. Rep.*, 226.

In *Welsh vs. Welsh*, 5 *Ohio R.*, 430, it is said: "Does it follow that because the plaintiffs have an equitable claim against the defendant, he can enforce this claim if he sues in *assumpsit*. If he prosecutes his suit in a court of law, he must in *assumpsit*, as well as in any other form of action, show that he has a legal right of action. When this is shown, the action will be governed by equitable circumstances."

The same proposition is established in *Kane against Bloodgood*, and would have been held by a court of law, as fatal to the recovery of the plaintiffs. Chancellor *Kent*, in speaking of the case of *Lawly against Lawly*, 9 *Mod. R.*, 32, says: "In this case, lands were settled, by will, on trustees; and one of the trusts was, that if the son's wife survived, she was to receive the rents and profits of the land, as the same were at that time let. Her husband, afterwards, greatly increased the rent, and upon his death, his wife enjoyed the whole of the rents, making no distinction between the original and the additional rent. A number of years after her death, her executor was sued by the devisee in tail, being a grandson of the testator, for an account of the surplus rents received by her, and by her executor. The plea of the statute of limitations was overruled, because the estate in law was in trustees, and the executor was decreed to account for the improved rents received by her, or by him, since her death."

There is no reason given, the Chancellor says, for this decree, but what is to be inferred from the single observation, *that the estate in law was in trustees*, and that must be understood to mean, that the plaintiff in the bill had not the legal title, and could not have maintained an action at law. Again, he says: "It was a suit by one *cestui que trust* against the representative of another *cestui que trust*, for receiving more of the rents than belonged to her; and I can see no reason why, as between

them, the statute could not have been applied, unless we adopt the plain rule, upon which alone the decision is intelligible and just, that the plaintiff was a *cestui que trust, without any title or remedy at law.*" 7 *J. Ch. Rep.*, 115. Without pursuing this subject further, or adverting to other objections that might have been raised against a recovery at law, we think that the only remedy open to the appellees is, that which they have adopted, the assertion of their title to the property in a court of equity, and as consequent upon that title, an account and payment of the rents and profits. In our opinion, therefore, the court below committed no error in overruling the plea of the statute of limitations.

It is scarcely necessary to add, that we do not adopt the proposition supposed to have fallen from the learned Chancellor, in the case of *Caborne vs. Godfrey*, 3 *Dessaus.* 517, that in controversies between parties standing in the relation of parent and child, "the statute of limitations does not apply, and time is unimportant," for the plain reason, that the court have no power to interpolate into the statute new exceptions and provisions. But we place our opinion on the ground, that as the bill was instituted by the appellees, within less than twenty years from the period at which their right of action accrued; and as their claim for an account and payment of the rents was incidental to, and consequent upon their assertion of title to the property, they are not barred by either limitations or laches.

We think, however, that the decree of the county court was erroneous on the question of assets.

In *Evans vs. Iglehart*, 6 *G. & J.*, 197, this court said, "the rule upon the subject of assets is different in the court of equity from what it is at law. Where you seek to charge an executor or administrator, in his representative character, before the latter tribunal, assets are presumed, unless as a fact it is put in issue by the pleadings, but before the former tribunal, assets in his hands, must be alleged, and if denied or not admitted, must be proved." In *Warfield vs. Gambrill*, 1 *G. & J.*, 511, it was decided, "that a respondent submitting to answer must answer fully, but if the answer be defective, and insufficient to meet the allegations and interrogatories of the bill, the complainant,

desiring a further response, must except to the answer. If he do not, he cannot rely on the silence of the respondent in relation to any material allegation, but must prove it." And in *Young vs. Grundy*, 6 *Cran.*, 51, the Supreme Court say, "that if the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing."

Mrs. Dugan states, in her answer, that she has received, as the executrix of *Cumberland Dugan*, the assets shewn by her return to the *Orphans* court, which she is prepared, when required, to produce. Surely this cannot be regarded as an admission of the sufficiency of assets, unless upon the principle asserted in *Smith vs. Smith*, 4 *Paige*, 272, "that as the executrix does not in her answer state that there is any deficiency of assets, the court must presume there is sufficient for the purposes of the suit." A proposition directly in conflict with the decisions, both of this and the Supreme Court.

The decree below, in this respect, was clearly erroneous, and as the objection is directed not against any vice or infirmity in the bill, or to the competency of witnesses, or to the admissibility of testimony, but because the complainants failed to establish, by proof, a material allegation in their bill, the appellants are not precluded, by the act of 1832, ch. 302, from raising it in this court. 7 *G. & J.*, 155.

It appearing to us that the substantial merits of the case will not be determined by affirming or reversing the decree of the county court, and that the purposes of justice will be advanced by permitting further proceedings therein, and further testimony to be taken in relation to assets, in pursuance of the 6th section of the act of December session 1832, ch. 302, the cause will be remanded to *Baltimore* county court, as a court of equity.

CAUSE REMANDED.

Mary Allender, et al., *vs.* The Vestry of Trinity Church.—*June* 1845.

In 1807, *G* conveyed to *S and others*, two lots, on which a church had then lately been erected, in trust; that the grantees upon being reimbursed all sums which have been, or may hereafter be paid and applied in and about the building of such church, release to such person or persons as shall or may be legally authorised to receive the same, all their estate in, &c. in trust for the said church. *A*, the surviving grantee, laid out a large sum upon the building, and devised the debt to the appellants, who, in 1837, filed a bill to sell the lots for repayment of their claim, against the vestrymen of the church: no person had been authorised to receive a release from the grantees. The vestrymen answered the bill, assented to a sale, but disclaimed knowledge of the amount of *A's* expenditures. Held:

1. The act of limitations was not a bar.
2. The right of the complainants rested upon the equitable implication of a lien.
3. The non-appointment of persons to receive a release, could only be accounted for by imparting to the vestry a knowledge of the fact, that the building of the church had not been paid for.
4. The only proceeding by which a recovery could be had, was *in rem*.
5. The assent of the appellees was a waiver of the objection, that the claim was a stale one, and abandoned by lapse of time.

Where one and the same person is both *cestui que trust* and trustee, and the right to recover rests on a mere equitable implication of a lien, not recognised at law, and there is no adverse or uninterrupted possession relied on in bar, the act of limitations constitutes no defence.

To entitle a party to the benefit of the act of limitations, the claim must be such that, if exempted from that plea, it could be recovered by an action in a court of law.

The act of limitations to be available, must either be relied on by plea or answer.

By the act of 1798, ch. , sec. 29, "No vestry can sell a lien, or transfer any of their estates or property belonging to the church, without the consent, at least, of five of their body,"—rector, church wardens, and bishop of the *P. E. Church*. The assent of vestrymen, to a decree for the sale of church property, in this case must be regarded as implied admission, that the debt claimed was due, as they have no power to make a voluntary sale of the property.

A notice entitled in another cause to produce books in evidence, merely filed in this, without proof of service, raises no inference against the party to whom the notice is addressed.

Primary proof in equity, stands in the place of full proof, until full proof is demanded. Such a demand dispenses with and invalidates primary proof.

It is a settled rule of evidence, that if a debtor defendant, seeking to discharge himself from a claim preferred against him, relies on the entries on the

credit side of the account, rendered or exhibited by his creditor, he thereby admits in evidence against him, the entries on the debit side of the account; and such debits not being discredited nor disproved by testimony in the cause, establish the claim according to the account.

In a controversy upon an account for work and labor, materials furnished, and money paid, after a lapse of twenty-four years, suit commenced, general proof of the nature and extent of the demand being in evidence, and free from suspicion, much less detailed proof should be exacted from the claimant; than if, immediately after its origin, a controversy in relation to it had arisen.

Signatures to receipts for money paid, being in the possession of the party and his representatives claiming under him, for more than thirty years, need not be proved. They are presumed to be genuine, when they relate to transactions, which are established as having occurred in conformity to the receipts, by general and collateral proof.

APPEAL from the equity side of *Baltimore* county court.

The bill in this cause was filed on the 20th September 1837, by the appellants and others, who claimed as creditors for money paid, laid out and expended, in and about the erecting of a church in the city of *Baltimore*.

It appeared that on the 20th May 1807, *William Goodwin* conveyed to *William Slater* and others, two lots of ground in *Baltimore*, on which said lots the *Trinity* church, &c. hath been lately erected, in trust; that the grantees, (of whom the appellants father and testator was one,) "upon being reimbursed and paid, all and every the sums of money which hath or have already been or may hereafter be, by them or either of them paid, &c., and applied, in and about the erecting and building of the aforesaid church," shall and will release, convey and assure unto such person or persons as shall and may be legally authorized to receive the same, by a good and sufficient deed, all the estate and interest of them the said *William Slater*, &c., of and in the said two lots in trust for the use of the said *Trinity* church, &c.

The bill claimed, among others, that *Joseph Allender*, deceased, had laid out to the 1st January 1826, the sum of $5661,18; and that such debt was specifically devised by him to the complainants. The bill prayed process against the heirs at law of *William Goodwin*, and the vestrymen of the church, that the property may be sold for payment of debts secured by the deed, &c.

The vestrymen, the appellees, answered the bill, admitted the deed, &c.; and that they have heard and believe, that *Joseph Allender*, &c., paid, laid out and expended, in the erection of the said church, sums of money, but to what amount, and whether the same has ever been repaid, these defendants have had no opportunity of knowing, and therefore insist, that the complainants be put to strict proof of their claims, &c.

The heirs at law of the grantor admitted the facts of the bill.

On the 20th September 1837, a decree was passed for a sale, by assent of parties, and a trustee appointed to make it, who reported a sale for the sum of $3600. A variety of proceedings were then had in relation to the amount of the claims and distribution of the fund, which are sufficiently stated in the opinion of this court.

The county court, (Magruder, A. J.,) rejected the claims of *Joseph Allender's* devisees, and ordered the proceeds of sales to be paid to the defendants, the vestrymen of the church.

The complainants appealed to this court.

The cause was argued before Dorsey, Spence and Martin, J.

By Glenn and Reverdy Johnson for the appellants, and
By Addison and Dulany for the appellees.

Dorsey, J., delivered the opinion of this court.

The claim sought to be recovered by the appellants, by the institution of the proceedings before us, has been resisted on various grounds; but the defences mainly relied on in this court, are the three following:

1st. The statute of limitations.

2dly. The staleness of the claim, from the length of time that the appellants have slept upon their rights; and

3dly. The absence of the necessary proofs to establish the same.

To determine on the sufficiency of the plea of limitations, as a bar to such a claim, it is necessary first, to ascertain the nature

of the claim, and before what tribunal its recovery can be pursued.

This is not a case, strictly speaking, of either express or implied trust, where one of the parties stands in the character of a trustee, and the other bears to him the relation of *cestui que trust;* but where one and the same person, was both *cestui que trust* and trustee. The right of the appellants to the relief they have sought, rests on a mere equitable implication of a lien, not recognised at law, and of which a court of law could in no way take cognizance: to such a court, in no form of action, could the appellants successfully apply for any adequate relief. *Doctor Allender,* as far as concerns the claim now asserted by his representatives, was both trustee and *cestui que trust;* and as the surviving joint tenant of the grantees of *William Goodwin,* held the property in question, until being reimbursed, all expenditures made by him in the building of the church, he should convey the same to the persons duly authorised to receive the deed of conveyance, as provided for in the deed from *William Goodwin.* That such persons were ever appointed, has not been pretended; and their non-appointment, although twenty-five years and more had elapsed since the completion of the church, can only be satisfactorily accounted for by imputing to the vestry a knowledge of the fact, that a conveyance could not lawfully have been called for, by reason of the only ground that could be assigned for its refusal or postponement, to wit, unrepaid advances for the building of the church. It has not been relied on as a defence in this cause, (nor if it had, could it, upon the proofs and proceedings before us, have been successfully maintained,) that the appellees have had the adverse and uninterrupted possession for more than twenty years, of the lots of ground and premises, the sale of which was sought by the bill of complaint of the appellants. To give to the appellees the benefit of the plea of limitations, the claim must be such, that if exempted from that plea, it could be recovered by an action in a court of law. To cite authorities for this, (even if before it could be deemed requisite,) since the case of *Kane vs. Bloodgood,* 7 *Johns. C. R.,* 90, cannot be necessary. Here, the appellants claim is a debt due by nobody. Neither

at law nor in equity can a judgment or decree be obtained, personally binding any body for its payment. The only proceeding by which a recovery can be had, is in *rem; in personam*, there is no remedy. The statute of limitations, then, could interpose no bar to the appellants right to recover, assuming it to have been formally pleaded in the answer of the appellees. But conceding that the statute of limitations could be applied to such a claim as that now before us, the concession is of no avail to the appellees, as the defence has neither been pleaded nor relied on in their answer. *Chambers vs. Chalmers, et al.*, 4 *Gill & Johns.*, 420.

The second defence on which the appellees have relied is, that the staleness of the appellants claim, by reason of the great length of time during which they have forborne to prosecute it, has caused a court of equity to shut its doors against them, by refusing to take further cognizance of the subject matter of their complaints. Without stopping to enquire, whether the peculiar nature and circumstances of this case do not sufficiently account for the delay in its prosecution? whether that delay was not, in some measure, the result of equal negligence and delay on the part of the appellees? and whether that negligence and delay is not to be accounted for solely on a ground, which at once opens the doors of a court of equity to the appeals to it, by the appellants, for relief?—we proceed to state the reasons why this defence cannot avail the appellees. By the assent of the appellees to the decree, which has been passed in this cause, they have, by necessary implication, waived the defence of which they now seek to take advantage; they have assented to the county court taking cognizance of the case, and enquiring into the intrinsic merits and justice of the claim of the appellants; they have acknowledged that there is a sum of money due to the appellants, for the payment of which, the county court were authorised, and ought to decree a sale of the property in question. Upon no other grounds could they have given their assent to the passage of the decree, which was given by the county court. By the twenty-ninth section of an act, entitled, "an act for the establishment of vestries for each parish in this State," passed at November ses-

sion 1798, it is enacted "that no vestry shall sell a lien, or transfer any of their estates or property, belonging to their church or churches, without the consent of five, at least, of their body, (of which number the rector shall always be one,) together with the consent of both the church-wardens; and in case there be no rector in the parish, then it shall be necessary to obtain the consent of the bishop of the *Protestant Episcopal Church* of this State, for the time being, previous to any sale, alienation or transfer of any of the estates or property aforesaid." To the decree passed by the county court, no assent of the rector, church-wardens, or bishop, was given: neither of them were parties to these proceedings. If the vestry had no power to make a voluntary sale of the property of the church, they had no power to confer upon the county court an authority to decree such sale. If there was nothing due to the appellants under the deed from *William Goodwin*, then the vestry were wholly unauthorised to give any assent to the decree for a sale, and the assent of itself, would give to the county court no power to make such a decree. Without imputing to the vestry a gross violation of their duty, and an imposition practised upon the county court, we cannot do otherwise, than regard their assent to the decree passed in this case as an implied admission by them, that there was a debt due to the appellants, under the deed from *William Goodwin*, for the payment of which, they were entitled to a sale of the church property.

The third ground upon which the claim of the appellants is resisted, is, that the proofs in the cause do not shew any thing to be due to them on account of expenditures made by *Doctor Allender*, in the building of *Trinity* church. And in support of this position they allege, that every presumption ought to be raised against their claim, because they did not exhibit, and have withheld the books of account of *Doctor Allender*, kept in relation to his receipts and expenditures for the church, although notified to produce them. It is true, that near the end of the record the following paper has been inserted, viz:

"*Price and others vs. Allender and others. Baltimore* county court, equity side. *James Biays, Walter T. Allender, adm'rs of Dr. Joseph Allender.* Notice is hereby given you to produce

the books of the *Trinity* church, which *Dr. Joseph Allender* had, as treasurer of *Trinity* church, to be used as evidence before the auditor and said court, in the taking of the account and hearing of the above case, and this is signed by the solicitor of the appellees."

But this notice is not entitled as of the case then before the court, nor does it appear when it was filed; or that the court ever acted or passed any order upon it; or, indeed, that the appellants ever had any notice of its existence. It raises, then, no inference against the validity or justice of the appellants claim, that they had not produced in court, books which they had no motive primarily to adduce, not being admissible evidence of their claim; which books, by no direct proof, are shewn ever to have been in their possession; and which, by no order of the court, or even notice served upon them from the opposite party, were they required to produce.

It has also been urged, that the county court were right in rejecting the appellants claim, because it was not authenticated in the mode prescribed by our testamentary system, for claims exhibited against the estates of deceased persons. This objection detracts nothing from the appellants right to recover. The appellees, by their answer, called upon the appellants for full proof of their claim; and this requisition *per se*, would have dispensed with the ordinary, pecuniary proofs of their claim, prescribed by our testamentary system, had it been made against the estate of a deceased person. What object could a claimant have in exhibiting primary proofs of his claim, when they would be wholly inadmissible evidence to sustain it, where full proof is required? Primary proofs stand in the place of full proof, until full proof is demanded. From that moment they cease to be any evidence in the case, and there no longer exists any necessity for their production.

We come, now, to the last defence of the appellees, the only open question in the cause, have the appellants offered sufficient evidence to substantiate a claim equal in amount to the fund to be distributed. The appellees have insisted, that conceding the proof in the cause, to shew that the appellants had expended the sum of money stated in their bill, over and above the

amount of their receipts, as shewn by the testimony; yet that account X is a pleading in the cause, and is evidence for the appellees of all the credits in the account, but is no evidence for the appellants as to the debit side of that account, and thus the claim of the appellants is more than overpaid, by their own shewing. In support of such a doctrine, no authority has been referred to, and we deem it unnecessary to adduce authorities against it. If any principle, both at law and in equity, is conclusively settled, it is, that if a debtor defendant, seeking to discharge himself from a claim preferred against him, relies on the entries on the credit side of the account rendered or exhibited by his creditor, he thereby admits in evidence against him, the entries on the debit side of the account. If then the appellees put their defence on the credits allowed them in account X, the debits of that account not being discredited or disproved by the testimony in the cause, establish the claim for which these proceedings were instituted.

But, say the appellees, the account X is no evidence in this case, (which is undoubtedly true,) and the vouchers produced by the appellants for the alleged payments by *Doctor Allender*, with the testimony taken in relation to them, are wholly insufficient for the purpose for which they are offered. And they further contend, that by reason of the great length of time which has elapsed since these transactions took place, that more full and minute testimony is required in relation to those vouchers, than if the present enquiry, in relation to them, had taken place immediately after they were given. That independently of the vouchers, it is not only necessary to prove the payment of the sums of money mentioned in those vouchers, but to prove that the materials furnished, and for which payment was made, were of good quality, were necessarily used in the building of the church, and were appropriate for the purpose for which they were used. That the services were actually and necessarily rendered, and were of the value of the payments made for them. That the work, with its value, done by each mechanic, and the necessity for such work, must be shewn, before there can be any allowance for the payments made to them. And that the handwriting of each subscriber

to those receipts, must be proved by competent testimony, before they can be received as evidence of the payments they purport to attest. That after a lapse of more than twenty-five years, this great particularity and fulness of proof is required of the representatives of *Doctor Allender;* and that stronger proof is demanded to sustain their claim, than would have been requisite had it been the subject of judicial scrutiny immediately after its origin, are positions which we think cannot be maintained upon any sound principles of reason, law or justice. On the contrary, in our opinion, much less detailed and conclusive proof should be exacted in support of the claim before us, than if, immediately after it originated, the present controversy had arisen.

Looking at the present case, as it is presented by the record, we do not see any material difference in respect to the proofs necessary to sustain their claim, if the appellants, instead of being complainants, as they now are, had been brought into court as defendants, to a bill filed against them by the appellees, calling for a deed of conveyance upon the terms specified in the deed from *William Goodwin*, and in bar of the relief prayed, they had set up the existence of the claim they are now seeking to recover. In support of such a defence, after such a lapse of time, could it be contended, that to sustain the vouchers then exhibited in that suit, as they are now in this, the fullness and particularity of proof suggested by the appellees would have been required by the court?

It must be borne in mind, that there is nothing to be found in the record, which taints with suspicion the vouchers adduced by the appellants. No proof has been given by the appellees which discredits or proves the injustice of any one of them. After a careful examination of them, we think, that far more of them are sustained by sufficient evidence, than are necessary to establish a claim beyond that now made by the appellants, after making all deductions for the credits, satisfactorily established by the appellees. It is in proof, by the testimony of the appellees, that the church "was carefully constructed, and with great solidity," and that the erection of such a building now, would cost $30,000; and there is no evidence before us to shew,

that when built, its erection could have been effected for a less sum of money. It is also proved, that *Joseph Jeffers* was the master carpenter, and *Charles Stansbury* the bricklayer for the building of the church. Their signatures are proved to all the vouchers to which their names are attached. The signature of *James Jeffers*, and his authority to receive, has been proved as to all the receipts given by him on account of his father. There has not been an insinuation in the argument, much less is there to be found in the record any proof, that the sums of money appearing by the vouchers to have been paid to *Joseph Jeffers* and *Charles Stansbury*, were greater in amount than they ought to have received for their services as master carpenter and bricklayer, for the erection of such a building. On the contrary, it appears, that after all the previous payments made to him, *Joseph Jeffers'* claim for a further sum for his services in building the church were submitted to arbitration, and the sum of $432 was awarded to him, which was paid by *Doctor Allender*. It is in proof, also, that *Joseph Jeffers* and *Charles Stansbury* are both dead. Under all the circumstances of this case, then, we are of opinion, that all the receipts or vouchers signed by *Charles Stansbury*, and those signed by *Joseph Jeffers* and *James Jeffers*, are sufficiently established by proof, to entitle the representatives of *Doctor Allender* to use them, in support of the claim they are now pursuing. And we are further of opinion, that all the vouchers of the appellants avouched by the signature of *Joseph Jeffers*, and those by the signature of *Charles Stansbury*, purporting to have thereon the receipts of those in whose favor they were avouched, are sufficiently established for the purpose above mentioned. The appellants are under no obligation to prove the signatures to those receipts. Having been in their possession, and that of *Doctor Allender*, whom they represent, for more than thirty years, as we may fairly presume, these receipts, under the circumstances and for the purposes for which they are brought before us, prove themselves. To hold otherwise, and carry out the views of the appellees, would be of ruinous consequence, and do flagrant injustice to trustees and agents, and would deter every prudent man from enlisting in such service. The vouchers accredited

by this court, after a deduction of all credits to which they are properly subject, exceed in amount the fund to be distributed.

This court are prepared to sign a decree, reversing the order of the county court appealed from, with costs to appellants in this court; the costs in the county court to be paid out of the fund in court; and ordering the fund in controversy to be paid over to the appellants, the executors of *Doctor Joseph Allender*.

DECREE REVERSED WITH COSTS.

Richard Edwards, *vs.* The Baltimore Fire Insurance Company.—*June* 1845.

Where there is a formal defect in the preliminary proofs offered by an assured to the underwriter, which could have been supplied had an objection been made by the underwriters to payment on that ground, but the underwriter put his refusal to pay on other grounds, the production of further preliminary proofs will be considered as waived.

Where the answer of the underwriter stated that the proofs were wholly unsatisfactory as to the amount of the loss; that all responsibility was denied by reason of a material concealment as to the character of the risk; that all claim had been forfeited under a particular article of the policy, and he also reserved all objections to recovery in any form, and without intending to waive any of the rights under the policy, this is not a waiver that the notice of the loss by fire was not "*forthwith*" given, and a particular account of the loss or damage, "*as soon after as possible*," delivered by the assured to the assurers, in conformity to the article in the policy, under which the claim was alleged to be forfeited.

The loss took place in November, and the objection was made in March; notice given, or an account of loss delivered, in March, would not have been a compliance with the policy.

There is no ground for the implication of a waiver of preliminary proof, where the assured could not have supplied the proof, nor remove the objection to the want of it, if the objection had been made. The assured, in such case, can sustain no injury by non-disclosure: He is not lulled into false security, nor prejudiced in the way of fraud or surprize.

Neither will the court imply a waiver, where the answer of the underwriter gives explicit warning and annunciation to the assured, that he designs to waive nothing, and that he must come to trial, fully prepared to prove every thing necessary to his recovery,

The terms, "*forthwith*," in a policy of insurance, used in connection with giving notice to the underwriter of the occurrence of a loss by fire—and "*as*

soon as possible" after a fire occurs, deliver a particular account of such loss, are not to be taken literally, but mean with due diligence, or without unnecessary procrastination or delay, under all the circumstances of the case.

In all ordinary cases, whether due diligence has been used by the assured; or he has been guilty of no unnecessary procrastination or delay, under all the circumstances of such cases, are questions of fact, to be determined by the jury,

It is not analogous to the question of diligence exacted by the law, from the holder of a dishonored note or bill, desirous of fixing the liability of previous parties to such instruments.

A policy of insurance, executed in *Baltimore*, against fire on merchandise in a house at *F*, required the assured *forthwith*, to give notice to the underwriter of any loss. The mail left *F* on Monday, Wednesday, and Friday, for *Baltimore*. The fire took place on *Friday* night, and the assured did not give notice by mail on Wednesday. All the circumstances attending the condition of the property, and the efforts of the assured to collect, and preserve it in its damaged state were left to the jury to determine, whether the assured was not so occupied on *Tuesday*, in doing every thing in his power for the safety and protection of the property, as to show, he had neither time nor opportunity to put the notice in the post office, in season for the mail of that day.

Appeal from *Baltimore* county court.

This was an action of *covenant* upon a policy of insurance against fire, brought on the 12th November 1842, by the appellant against the appellee, who pleaded *non infregit conventionem*.

The plaintiff, to support the issue on his part, gave in evidence his application for insurance.

Baltimore, Sept. 28th, 1839.

To the President and Directors of

The Baltimore Fire Insurance Co.,

The subscribers want insurance on account of *Richard Edwards*,—desire to be insured against loss or damage by fire, for the term of one year, to the amount of $5000, on the property described below; that is to say, on merchandize, such as is kept in a country store, in a frame building, now occupied by *R. E.*, located between two mountains, standing alone. Frame stable about one hundred yards from the store. A furnace about five hundred yards from store. In *Farrandsville, Clinton County, Pennsylvania*, near the canal. If any loss

should happen, the amount of said loss to be paid to *Hooper & Graff*, they showing a legal claim against the said *Edwards*.

HOOPER AND GRAFF.

"What premium will be required?"—

"$5000, at 1 per cent., $50."

"*Baltimore*, 28th September 1839.—Accepted, HOOPER & GRAFF."

Also:—

Baltimore F. Ins. Office, 1*st Oct.* 1839.

MR. HOOPER,

Dear Sir:—You will please call at the office as soon as you can make it convenient, as I cannot make out your policy before I see you. Respectfully,

W. A. TUCKER, *Pres't.*

Baltimore F. Ins. Office, 19*th Oct.* 1839.

Dear Sir:—If you should be passing by my office, please call in. Respectfully Yours,

W. A. TUCKER, *Pres't.*

Messrs. *Hooper & Graff.*

The policy of insurance, dated 23d October 1839, was in conformity to the order for insurance.

The 7th article of the policy, made it the duty of all persons insured, in case of fire, to do every thing in their power for the safety and protection of the property insured; and all persons insured by this company, sustaining any loss or damage by fire, are forthwith to give notice to the company; and as soon after as possible, to deliver in as particular an account of their loss or damage, signed by their own hands, as the nature of the case will admit; and make proof of the same by their oath or affirmation, and by their books of accounts, and other proper vouchers as shall be reasonably required, and shall make oath whether any, and what other insurance is made on the same property, and shall procure a certificate under the hand of a magistrate, or notary public, (most contiguous to the spot where the fire happened, and not concerned in such loss,) that they are acquainted with the character and circumstances of the person or persons insured, and do know, or verily believe,

that he, she, or they, really and by misfortune, and without fraud or evil practice, have sustained by such fire, loss, or damage to the amount therein mentioned; and until such affidavits and certificates are produced, the loss shall not be payable. So, also, if there appear any fraud or false swearing, the claimant shall forfeit his claim to restitution or payment by virtue of this policy.

The plaintiff also proved the following letters, admitted to have been received by the company:

Baltimore, Nov. 26th 1839.

Wm. A. Tucker, Esq., President, &c.

Sir:—We, yesterday, received information of the destruction, by fire, of the property insured by you, by policy, No. 5959, (dated per application, Sept. 28th 1839, in the name of *Richard Edwards*,) which insurance was effected by us, and to be paid to us if loss should take place; we shall immediately take steps to procure the necessary proofs of the loss, amount of property destroyed, and furnish you with the same. You will, therefore, hold the same subject to our order and adjustment.

Respectfully yours, Hooper and Graff.

Also :—

Baltimore, Dec. 28th 1839.

Wm. A. Tucker, Esq., President, &c.

Sir:—We lay before you this day, papers shewing the loss by fire, on policy No. 5959, which you will examine.

Respectfully, Hooper and Graff.

Also :—

To the P. and D. of the B. F. Insurance Co.

Gent:—You will take notice, that I did, on the 7th December 1839, transfer all my right, title, claim and interest, in policy No. 5959, *(Baltimore Fire Insurance Co.,) to Messrs. Hooper & Graff*. You will, therefore, account to them for the loss sustained on said policy, and their receipt will be good for the same. Respectfully,

Richard Edwards.

Baltimore, Jan 9th, 1840.

Baltimore F. Ins. Office, Jan. 13*th* 1840.

Dear Sir:—I wish to see your books and other papers, in relation to your loss under the policy, from this office.

Respectfully, WM. A. TUCKER, *Pres't.*

P. S.—On reflection, I wish, also, to see the bills of parcels of your purchases. You will please to call at the office as soon as convenient. WM. A. TUCKER, *Pres't.*

(Mr. Richard Edwards, Farrandsville, Clinton county, *Pennsylvania.*—Care of *Hooper & Graff, Baltimore.)*

Baltimore, Jan. 14*th* 1840.

W. A. TUCKER, ESQ., Pres't B. F. INS. CO.

Sir:—In reply to your note of yesterday, I must beg leave to refer you to *Messrs. Hooper & Graff,* as you are well aware, they are the only persons authorized to settle the claim in the policy, No. 5959. RICHARD EDWARDS.

Also :—

Baltimore, February 11*th* 1840.

To the P. and D. of the BALTIMORE F. I. CO.

Gent:—We beg leave respectfully to inform you, that the books of account of *Richard Edwards* of, &c., showing the amount and value of the merchandize covered by your policy of the 23rd of October 1839, No. 5959, and subsequently destroyed by fire, as you have been already advertised, are in our possession, at our office in *North Street,* subject to your examination at your pleasure, for which purpose we will deliver them to you, if desired; and that we are ready to furnish any other proof in addition to that already communicated, which you may reasonably require of the fact and extent of said loss.

We have the honor to be,

Very respectfully, your obedient serv'ts,

NELSON AND BUCHANAN, *Atty's for R. E.*

Also :—

Baltimore F. Ins. Office, March 3*rd,* 1840.

To RICHARD EDWARDS, ESQ.,

Sir:—The books and papers you have left for the inspection of the company, to sustain your claim for loss under a policy effected at this office, were so numerous, that I am only able now to state, after their examination, that this company con-

siders them wholly unsatisfactory as to the amount of your claim, even if the company were responsible at all. They deny, however, any responsibility, by reason of a material concealment as to the character of the risk; and even if the policy ever had attached, by reason of the circumstances attending the fire, if any responsibility ever had existed, it has all been discharged, and your claim forfeited under the 7th condition of insurance, annexed to the policy; for you have, on oath, rendered an account of loss, in which you estimate a lot (of goods) at *Lockhaven*, as worth $150;—which, in the first place, was never intended to be included in the policy; and, in the second place, we suppose, was not consumed by fire. With a reservation of all objections to your recovering, in any form, and without intending to waive any of our rights under the policy, we leave you to pursue any course you may deem expedient. Respectfully,

W. A Tucker, *Pres't.*

The plaintiff offered proof of the location and condition of the store, and its contents; the goods left, after the fire, were removed to an adjacent building; many in a bad condition, soiled and rumpled, and were then in the possession of the sheriff of the county, who had commenced arranging them, for the purpose of making an inventory. The witness, on the next day, (Saturday,) assisted the sheriff, who was then absent two days, and locked up the goods; as soon as the inventory was finished, a copy was made and sworn to by plaintiff. After the inventory and affidavit were finished, they were put into the post office, at *Farrandsville*, directed to *Hooper & Graff, Baltimore*, the inventory and affidavit were procured for the plaintiff, as soon as they possibly could be done. They were engaged two or three days in taking the inventory. Witness, when in *Baltimore*, went to the office of defendant, and there saw the copy of inventory, and which he sent to *Messrs. Hooper & Graff*, from *F.*, in the possession of *Mr. Tucker*, the president of the company. *Mr. Buchanan* stated, that witness was *Mr. Edward's* clerk, and had brought down all the books and papers, and they were now ready to go into an examination of them, to which *Capt. Tucker* replied, he had

no time then for an examination, but would like to have the books and papers sent to the office, so that he could examine them at his leisure. The interview with *Capt. Tucker*, was in the latter part of January or February 1840, and there was but one. Deponent reached *Baltimore* on the *third* day after he left *Farrandsville;* the plaintiff was in *F.*, from the time of the fire until January. The goods were levied on by the sheriff, after the fire, under execution.

Evidence was also given by the plaintiff, of the visit of *Hooper* to the president of the company; the delivery of the inventory and various accounts, and that the loss was disputed by the company, because *Capt. Tucker* contended, in a conversation he had with *Edwards* and *Hooper*, that they had not performed the conditions of the policy, in rendering an account, whereby the company could ascertain the loss; and also complained to *Mr. Hooper*, as the agent of *Edwards*, of the delay in transmitting the account and statement of loss, and *Capt. Tucker* complained to witness, that the company had not been notified of the sheriff's sale, which took place after the fire, so that the company had no opportunity of appointing appraisers, to ascertain the partial loss, as provided for by one of the conditions of the policy.

The plaintiff also proved, the burning of his store on the evening of the 18th November 1839; that the sheriff who levied upon the goods, did not authorise the taking of any inventory, except when he was present; that the plaintiff offered to assist him in taking it, and he had the assistance of his clerk in part. The sheriff took possession on the 21st November 1839, and commenced his inventory on the 22nd, and completed the same on the 14th December. The confusion from the fire, produced much delay. *Edwards* could not have obtained a copy until the sheriff completed his. The sheriff's sale commenced on the 16th December 1839, was adjourned from day to day, and completed 8th January 1840. The inventory comprised about twelve pages of folio paper. The distance from *Lockhaven* to *Farrandsville* is about seven miles. Witness was not certain whether the mail came daily from *F.* to *L.*, or every other day, from the 21st November 1839, to the 1st January 1840. From

Lockhaven to *Baltimore*, there was then, and is now, a daily mail. The *F.* and *L.* mail are united at *L.* The sheriff had exclusive possession, on and after the 21st November 1839, of the injured and remaining goods. The plaintiff was not at home on the evening of the fire, he had gone to *Lockhaven*, and returned about 10 o'clock, after the fire. There was a post office at *Farrandsville*, and the mail left there on *Monday*, *Wednesday* and *Friday* for *Baltimore*, and if no accident happened, a letter would arrive in *B.*, from *F.*, on the night of the *third* day, and be delivered on the morning of the *fourth* day. It was tri-weekly at *F.* in 1832. In the spring of 1840, it was daily. The mail did not leave *F.* regularly, and frequently failed to connect at *Williamsport*. In 1839, there were three contracts for carrying the mail between *F.* and *Northumberland*, which was the distributive office; that *six* or eight days would not be unreasonable from *F.* to *Baltimore*, as the roads were obstructed at that time from the 20th of the month. From *F.*, the mail in December, would be very uncertain. The mails from *N.* to *B.*, in *Baltimore*, were as follows: 15th November, received on the 16th; 17th on the 18th; 18th none; 19th on the 20th; 20th to 27th, each on the day following; to 1st December, none.

The plaintiff also proved, that before the 11th February 1840, his counsel called on the defendants, and requested to see the preliminary proofs of loss, furnished them by the plaintiff, but that the defendants refused to show him the same; and that before the trial of this case, notice was given to the defendants to produce the same in court, which they have refused to do.

The plaintiff prayed the court to instruct the jury:

"That if they believed the facts set out in the foregoing statement, the defendants have waived the adduction by the plaintiff of the preliminary proofs required by the conditions annexed to the policy of insurance, and that such waiver dispenses the plaintiff from now offering evidence of his having furnished the same."

The defendants prayed the courts opinion to the jury as follows:

1st. That if they find, from the evidence, that the house, in which the goods insured were at the application for the insurance, was used as a dwelling house, that then the policy in this case is void under the 2nd article of the conditions annexed to the policy in question, because the description of the same in the application for insurance, was false.

2nd. If the jury find the facts stated in the first prayer, and also find, that if said house had been truly described as occupied as a dwelling, that the risk of the insurance would, in the opinion of the underwriters, have been considered as enhanced, and a higher premium have been charged than was charged in this case, that then the plaintiffs are not entitled to recover, the policy being void under the 2nd article of the conditions of insurance, attached to said policy.

3rd. That the plaintiffs are not entitled to recover, because they have not offered evidence that they forthwith gave notice of the loss to the defendants, or as soon as possible after the fire occurred, delivered to them the particular account of their loss or damage, signed by them, as the nature of the case admitted; and made proof of the same by his oath, and by his books and accounts, and other proper vouchers, as required by the 7th condition attached to the policy.

4th. That the true construction of the policy of insurance in this case, is, that the insurance was effected for the benefit of *Hooper & Graff*, the persons applying for the same as evidenced by the order for insurance of the 28th September 1839, given in evidence by plaintiff, and the terms of the policy itself; and that no recovery can be had in this case for any loss, which the jury may find from the evidence, occasioned to the goods insured, without evidence that said *Hooper & Graff* had a legal claim against said *Edwards*, the plaintiff, and if there be any evidence, then, only to the extent of any such claim as may be shewn by evidence.

The court, (Le Grand, A. J.,) rejected the prayer of the plaintiff, and also rejected the first, second, and fourth prayers of the defendants, and granted the third prayer of defendants.

To the rejection of the plaintiff's prayer, and the granting of the third prayer of defendants, the plaintiff excepted, and prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MARTIN, J.

By NELSON and W. F. GILES, for the appellant, and
By R. JOHNSON and DAVID STEWART, for the appellees.

DORSEY, J., delivered the opinion of this court.

The bill of exceptions taken by the appellant in this cause, is to the county court's refusal to grant the prayer made by him, and to the granting of the third prayer of the defendants.

The plaintiff prayed the court to instruct the jury, "that if they believed the facts set out in the foregoing statement, the defendants have waived the adduction, by the plaintiff, of the preliminary proofs required by the conditions annexed to said policy of insurance, and that such waiver dispenses the plaintiff from now offering evidence of his having furnished the same."

Assuming, that the letter of the defendants, of the 3rd of March 1840, was a flat denial of the plaintiff's right to recover, upon a ground going to the merits of the plaintiff's claim, and having no reference to the preliminary proofs thereof, to be furnished to the defendants, (which, for the plaintiff, is the most favorable light in which it could be regarded,) the plaintiff's prayer was properly rejected by the court. It carried the doctrine of implied waiver of preliminary proofs, far beyond any of the cases referred to in support of it; and farther than it can be legitimately extended upon the principles on which it is founded.

In the case of *Allegre vs. The Maryland Ins. Co.*, 6 *Har. & John.*, 408, the preliminary proof omitted to be furnished to the underwriters, was the invoice of the cargo insured, which, with all the preliminary proofs requisite in that case, were of such a character, that furnishing them by the insured, at the date of the letter from the *Insurance Company*, would have been a sufficient compliance with the provisions of the policy, in respect to the preliminary proofs; and a requisition for their production, could, by the assured, at once have been complied with.

The principles upon which the waiver of preliminary proofs depend, are correctly stated in the case of *Mc Masters and Bruce vs. The Western Mut. Ins. Co.*, 25 *Wendell*, 382, where the court say, "the law is well settled, that if there be a formal de-

fect in the preliminary proofs, which could have been supplied had an objection been made by the underwriters, to payment on that ground; if they do not call for a document, for instance, or make an objection on the ground of its absence or imperfection, but put their refusal upon other grounds, the production of such further preliminary proofs will be considered as waived." And, speaking of the interviews between the insured and the agents of the company, the court further say, "had the objection been made in the course of these interviews, the defects might at once have been remedied."

In the case of the *Ætna Fire Ins. Co. vs. Tyler*, 16 *Wendell*, 401, Chancellor *Walworth* says, "the law is well settled in this State, that if there is a formal defect in the preliminary proofs, required by the policy or the custom of the place, and which could probably have been supplied, had any objection been made by the underwriters, to the payment of the loss on that ground; if the insurers do not call for the document, or make no objection on the ground of its absence or imperfection, but put their refusal to pay distinctly on some other ground, the production of such further preliminary proof will be considered as waived." And in 2 *Wendell*, 71, *Ocean Ins. Co. vs. Francis*, it is decided, that "where the underwriters make no objection to the sufficiency of proof of interest, but put their refusal, to pay on the ground, that they are not liable for the loss, it is a waiver of preliminary proof of interest." Why is it such waiver? Because, had the objection been then raised, the proof of interest, according to the stipulations of the policy, could then, and would, have been adduced by the assured.

But what is the objection to the sufficiency of the preliminary proofs in the case now before us? It is, that the notice of the loss by fire, was not "forthwith" given, and a particular account of the loss or damage, "as soon after as possible," delivered by the assured to the assurers. Suppose the objection had been raised in the letter of the president of the *Insurance Company*, of the 3rd March 1840, could the appellant have bettered his condition? Would notice then given, or an account of loss then delivered, have been a compliance with the conditions of the policy? Unquestionably not. There is no ground, there-

fore, for the implication of the waiver insisted on by the appellant. He could not have removed the objection, had it been made; he has sustained no injury by its non-disclosure. The conduct of the appellees has lulled him into no false security; has prejudiced him, neither in the way of fraud, nor surprise.

Suppose, however, it were otherwise, and that the objection, if raised, could then have been obviated by the appellant, we think the letter of the underwriters, of the 3rd of March 1840, repels every presumption of any waiver on their part, and is an explicit warning and annunciation to the appellee, that they designed to waive nothing, and that on the trial of any action which he might institute against them, he must come prepared to prove every thing, which, according to the terms and conditions of the policy of insurance, it was necessary to prove, to entitle him to recover.

For the reasons we have stated, we think the county court were right in rejecting the appellant's prayer.

The third prayer of the appellees, to the granting of which the appellant has excepted, is, "that the plaintiffs are not entitled to recover, because they have not offered evidence, that they forthwith gave notice of the loss to the defendants, or as soon as possible after the fire occurred, delivered to them the particular account of their loss or damage, signed by them, as the nature of the case admitted, and made proof of the same by his oath, and by his books and accounts, and other proper vouchers, as required by the seventh condition attached to the policy."

To enable us to judge of the correctness of the court's conduct, in granting this prayer, the meaning of the terms, "forthwith," and, "as soon as possible," as used in the policy of insurance, ought to be ascertained To give to them their literal import, would, in almost every case of loss by fire that occurs, strip the insured of all hope for indemnity for the loss incurred; and policies of insurance against fire, would, as to the insured, instead of being contracts of indemnity, as they profess to be, become engines of fraud and injustice in the hands of the underwriters, and a recovery by the insured, would be rarely, indeed, if ever practicable. Such a construction,

therefore, has not been sanctioned by courts of justice. The true meaning of those terms is, *with due diligence, or without unnecessary procrastination or delay, under all the circumstances of the case.* See *Inman vs. Western Fire Ins. Co.*, 12 *Wendell*, 461, where it was determined that, "forthwith," in such a policy, imposes upon the insured nothing more than what is called due diligence, under all the circumstances of the case;" and *Cornell vs. Le Roy*, 9 *Wendell*, 166, where it was decided, that "the assured is, as soon after the fire as possible, to deliver in a particular account of such loss or damage, and this means no more, than it is to be done with due diligence, under all the circumstances of the case; there is to be no unnecessary procrastination or delay."

In all ordinary cases, whether due diligence has been used by the insured, or he has been guilty of no unnecessary procrastination or delay under all the circumstances of the respective cases, are questions of fact to be determined by a jury. We cannot assent to the proposition contended for by the appellees, that the same transmission of notice of loss necessary to constitute due diligence on the part of the insured in this case, that according to "*The Law Merchant*," and an unbroken chain of decisions of courts of justice, is deemed due diligence by the holder of a bill of exchange or promissory note, seeking to charge those contingently liable for the payment thereof, viz: that notice must be transmitted to those sought to be charged by it, by the next mail after the dishonor of the bill or note. Such a rule, as an unbending principle of law, has not, and we think ought not, to be applied to contracts like that now before this court. And in reference to such contracts, we entirely concur with the views and principles so perspicuously and forceably stated, in note (*p.*) to page 451, of 1 *Stark. on Ev.*, as follows, "in general, questions of reasonable time, reasonable care, due diligence, probable cause, and such like, depend so much on their own peculiar circumstances as not to admit conveniently of any general rules, and it is of greater convenience to depend on the judgment and discretion of a jury, deciding on a comparison of the circumstances with the ordinary course of practice, or with reference to the ordinary principles of fair

and honest dealing, than to introduce such a multiplicity of legal rules and definitions as would be necessary for the due decision of cases, subject to such infinite variety of circumstances. It is, in truth, a matter of important and obvious policy, rather to refer questions of this nature as matters of fact to a jury, than to frame legal rules applicable to particulars. The difficulty of framing precise rules must, in such circumstances, be very great, for the reasons adverted to, unless they be founded on some prominent and decisive incidents. Whenever the court decides upon circumstances, the decision would become a precedent and rule of law, and as such decision would afford room, by comparison, for a great number of distinctions, the obvious effect would be, to multiply such decisions and distinctions to a very inconvenient and burthensome extent. On the other hand, by abstaining from legal decision, except in cases where some decisive rule or principle of law is clearly applicable, and by adopting in others the inference of the jury, in point of fact, substantial justice is administered in simplicity, and free from perplexity occasioned by nice and subtle distinctions, and conflicting decisions. And this is an advantage, and by no means an unimportant one, incident to the system of trial by jury: the law can thus deal in general definitions and leave the rest as fact to the jury, without multiplying decisions and precedents; but if the judges, and not the jury, were to decide, every decision would become a precedent, and legal distinctions would be multiplied to an excessive extent."

According to the facts in this case, as appearing on the record, would it be irrational in the jury to conclude, that the plaintiff had been guilty of no want of due diligence in not forwarding a notice of the loss by the mail of Wednesday, by reason of his being so occupied on Tuesday in doing "every thing in his power for the safety and protection of the property insured," which, by the express terms of the policy, he was bound to do, that he had neither time, nor opportunity, to put the notice in the post office in time for the mail of that day.

The defendant's third prayer, withdrawing from the consideration and finding of the jury the question, as to due diligence in giving notice of the loss by fire, and the question whether

there was any unnecessary delay in delivering the particular account of the loss, we think that in granting that prayer, the county court were in error.

But, conceding that we are wrong in the opinion we have expressed, as to the tribunal by which the question of due diligence in giving notice, to the *Insurance Company*, of the time of loss, is to be determined, and that to shew due diligence, the plaintiff must prove that such notice was put into the post office in time for the next mail, (after the fire,) from *Farransville* to *Baltimore*, the county court, in granting the third prayer of the defendants, took that fact from the consideration of the jury, and determined it in the negative; although there was evidence before the jury, from which it was competent for them to find, if they believed from the evidence, the fact so to be, that such notice was put into the post office, in time to have been transmitted in the first mail, after the fire, from *Farransville* to *Baltimore*. On this ground, if all others were wanting, we think there is error in the court below in giving to the jury the instruction prayed for in the defendant's third prayer.

We concur with the county court in its rejection of the plaintiff's prayer, but dissent from its granting the defendant's third prayer, and therefore reverse its judgment.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

PHILIP TURNER *vs.* JAMES T. N. MADDOX, EX'R OF ELEANOR W. TURNER.—*December* 1845.

Under the act of 1785, ch. 80, sect. 11, the courts have power to enter judgments on awards returned under that act, notwithstanding the death of either of the parties to the cause referred.

So in an action upon a contract to indemnify one from the consequences of a judgment to be rendered in a pending suit, and which suit was referred under the act of 1785, and during the reference, the person to be indemnified died, the defendant, the guarantor, cannot impeach the validity of such judgment by showing the death of the defendant therein, before it was rendered upon the award.

Evidence should correspond with the allegations of the declaration, or be confined to the point in issue.

In an action by an executor to recover back money alleged to have been paid by his testatrix in her life time, he cannot show a payment by himself after her death.

APPEAL from *St. Mary's* county court.

This was an action of *assumpsit* brought on the 11th July 1843, by the appellee, who declared, that the appellant, on the 23rd January 1838, in consideration that the said *E. W.*, then administratrix as aforesaid, inhabiting in this State; that is to say, at, &c., had a settlement by which she paid to the said *Philip* all his right, title, claim and interest to the personal estate of *Henry Turner;* he, the said *P.*, undertook and faithfully promised, that he, the said *P.* would indemnify her, the said *E. W.*, administratrix as aforesaid, against all and any charges and damages whatsoever, for and by reason of a suit pending between *L. E. T.* and the said *E. W. T.*, administratrix of *H. T.* And the said *James T. N.* in fact saith, that the said *E. W.* giving faith and credit to the promise and assumption aforesaid, of the aforesaid *P.*, afterwards, &c., did pay over to the said *P.* all his right, title, claim and interest as aforesaid. And the said *James T. N.* in fact further saith, that afterwards, &c., the said *L. E. T.* obtained a judgment against her, the said *E. W.*, and thereby recovered a considerable sum of money, amounting, in the whole, to the sum of, &c. And the said *E. W.*, in her life time, had also thereby been put to very great charges, and forced to lay out and expend sundry other large sums of money, for her costs accruing on her, the said *E. W.*, defending the said suit, amounting to the further sum of, &c., as by the record of the said county court may more fully appear; of all which premises the said *P.* afterwards, &c., had notice. And so the said *James T. N.*, executor as aforesaid, saith, that the said *Philip* did not indemnify her, the said *Eleanor W.*, according to the promise and assumption aforesaid, of him, the said *Philip*.

The defendant pleaded *non assumpsit*.

1ST EXCEPTION. At the trial of the cause the plaintiff read in evidence the agreement between *Philip Turner* and *Mrs. Eleanor Turner*, viz :

"I have this day, January 23rd 1838, had a settlement with *Mrs. Eleanor W. Turner*, administratrix of *Henry Turner*, and have received all my right, title, claim and interest in and to the personal estate of *Henry Turner*, of his administratrix, *Eleanor W. Turner*. And I hereby bind myself to indemnify her, the said *Eleanor W. Turner*, against any and all losses which may accrue from a suit now pending between *Lewis E. Turner* and *Mrs. Eleanor W. Turner*, administratrix of *Henry Turner;* the said suit having been instituted against *Eleanor W. Turner*, as administratrix of *Henry Turner*, who was security for *Josiah Turner*, on his guardian's bond, from which bond there was a balance due to the said *Lewis E. Turner*. PHILIP TURNER.

Test:—*J. T. N. Maddox.*"

And then offered to read in evidence a judgment of the State of *Maryland*, for the use of *Lewis E. Turner*, against *Mrs. Eleanor Turner*, administratrix of *H. T.*, rendered, on the 16th March 1839, for $609,70, on an award.

The defendant then offered to prove, by a legal and competent witness, that *Mrs. E. W. T.*, the defendant in said judgment, died on the 19th June 1838, for the purpose of shewing that said judgment was a nullity, having been rendered against a dead person. But the court, (KEY and DORSEY, A. J.,) refused to allow the defendant to give the said evidence to the jury, but permitted the judgment to be read in evidence by the plaintiff, to which refusal the defendant excepted.

2ND EXCEPTION. The plaintiff to support the issue on his part, joined in addition to the evidence, incorporated in first bill of exceptions, which is made part hereof, then read in evidence to the jury the said judgment therein mentioned, and offered to prove by a competent witness, that the executor of *Mrs. E. W. T.*, paid to witness, who was plaintiff in the said judgment, the amount thereof, after the death of *Mrs. E. W. Turner*, but the defendant objected to the said testimony going to the jury, under the pleadings in this cause; the court permitted the said evidence to go to the jury, to which permission of the court the defendant excepted.

The verdict and judgment being against the defendant, he appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By J. JOHNSON for the appellant.

MARTIN, J., delivered the opinion of this court.

This case comes before us upon an appeal from *St. Mary's* county court, and presents, for our examination, the opinion of the court as expressed on questions of evidence, in two bills of exception.

A suit was instituted by the appellee against the appellant, on the 10th of July 1843, and was brought upon a contract of indemnity, given by the defendant below to the plaintiff's testatrix, as administratrix of *Henry Turner*, on the 23rd of January 1838, in which the appellant stipulated to indemnify the appellee's testatrix against any loss that might accrue to her, from a suit then depending between her, as such administratrix, and *Lewis E. Turner*.

The contract was executed by *Philip Turner*, and was in these words:

"I have this day, 23rd January 1838, had a settlement with *Mrs. Eleanor W. Turner*, administratrix of *Henry Turner*, and have received all my right, title, claim and interest, in and to the personal estate of *Henry Turner*, of his administratrix, *Eleanor W. Turner*, and I do hereby bind myself to indemnify the said *Eleanor W. Turner*, against any and all losses that may accrue, from a suit now pending between *Lewis E. Turner* and *Mrs. Eleanor W. Turner*, administratrix of *Henry Turner*, the said suit having been instituted against *Eleanor W. Turner*, as administratrix of *Henry Turner*, who was security for *Josiah Turner*, on his guardian's bond, from which there was a balance due to the said *Lewis E. Turner*."

The declaration contained only one count upon the indemnity, and alleged, that *Lewis E. Turner* obtained a judgment against the plaintiff's testatrix, and thereby recovered a large sum of money; and that the plaintiff's testatrix, in her lifetime, had also thereby, been put to great charges, and forced to lay

out and expend other large sums of money, for defending the said suit. The issue was joined on the plea of *non assumpsit*.

At the trial of the cause, the plaintiff having proved the contract of indemnity, offered to read in evidence to the jury the short copy of a judgment, in the name of the State of *Maryland*, for the use of *Lewis E. Turner*, against the plaintiff's testatrix, as administratrix of *Henry Turner*, rendered in *St. Mary's* county court, the 16th March 1839, *on award*, for the sum of $609.70, with interest.

The defendant then offered to prove, that *Eleanor Turner*, the defendant in the judgment, died on the 19th of June 1838: for the purpose of showing, that the judgment was a nullity, having been rendered against a dead person. The court refused to allow the defendant to give such evidence to the jury, but permitted the judgment to be read in evidence by the plaintiff. To this refusal by the court, the defendant excepted, and this forms the subject of the *first* exception.

By the 11th section of the act of Assembly of 1785, ch. 80, it is provided, "that all causes, referred by consent of parties and rule of court, shall be continued until an award is returned, and if the death of either of the parties happen before an award is returned, and judgment thereon, such cause shall not abate by the death; and upon reasonable notice to the persons succeeding to the interest of, or representing the deceased in the matter or thing in contest, and not being a minor, the arbitrators shall proceed to a determination, and return their award; upon which, judgment may be entered by the court, and such judgment shall be good and sufficient in law, notwithstanding the death of either of the parties."

The judgment read in evidence by the plaintiff, was rendered upon an *award*, and it is seen that the power to enter a judgment of this character, is conferred upon the court, by the express terms of the 11th section of the act of 1785, ch. 80, *non obstante*, the death of either of the parties.

The validity of the judgment could not, therefore, be affected in any manner, by the death of *Mrs. Eleanor Turner*, and we think, the evidence offered by the defendant, to prove that fact, was properly rejected by the court, as irrelevant and immaterial.

The plaintiff having offered in evidence the contract of indemnity, and the judgment of the 16th of March 1839, already adverted to, proposed to prove, that the executor of *Eleanor Turner*, the plaintiff in the action, after her death, paid the amount of the judgment recovered against her, to *Lewis E. Turner*, the plaintiff in the judgment.

The defendant objected to this evidence; but the court suffered it to go to the jury. And the question presented in the *second* exception, is, whether this testimony was admissible under the pleadings in the cause?

We are of opinion that it was not. It is a settled principle, governing in the production of evidence, that it must correspond with the allegations of the declaration, and be confined to the point in issue. A late writer, on the law of evidence, says:

"The pleadings at common law, are composed of the written allegations of the parties, terminating in a single proposition, distinctly affirmed on one side, and denied on the other, called the issue. If it is a proposition of fact, it must be tried by the jury upon the evidence adduced. And it is an established rule, which we state as the first rule, that the evidence offered must correspond with the allegations, and be confined to the point in issue." *Gr. E.*, 58.

In the case of *Clarke against the State, use Darnall*, 8 *G. & J.*, 125, the Court of Appeals say: "The rejoinder had placed the issue entirely on the collection and receipt, by *Richard Hall*, of the money claimed as guardian, for his ward; and all the aforegoing evidence intended to establish the fact, of his having discharged himself of liability, by the payment of the sum proved to be in his hands, to a successor, legally qualified to act, was foreign to the issue, and was, therefore, inadmissible proof." The same proposition is announced by the court, in the case of the *Pennsylvania, Delaware and Maryland Steam Navigation Company, against Dandridge*, 8 *G. & J.*, 313.

Testing, then, the question of the admissibility of the evidence, by this familiar rule, the only enquiry that can arise, is, whether there is to be found in the declaration in this case, any

averment, that the judgment rendered against *Eleanor Turner*, was paid by the executor?

An examination of the declaration will show, that there is no such allegation. The only averment connected with the loss to which *Mrs. Turner* had been subjected, in consequence of the suit depending between her and *Lewis E. Turner*, and against which she was to be protected by the contract of indemnity, "were charges to which she had been put, and money which she had been forced to pay," *in her lifetime;* and that there is, between an allegation of this kind and proof of the payment of the judgment, after her death, by her executor, a fatal *variance*, is a proposition too clear for dispute.

We think, therefore, that the opinion of the court below, as expressed in this exception, is erroneous, and must be reversed. But as the evidence would be admissible in a different form of pleading, we shall order a *procedendo*.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JOSEPH B. BURROUGHS *vs.* PHILIP CLARKE, E. B. ABELL AND JOHN GREENWELL.—*December* 1845.

It is a departure in pleading, where after a defendant has pleaded performance of the condition of a bond generally, and the plaintiff has replied a breach of the condition, for the defendant to rejoin the insolvency of the plaintiff, and transfer of his right of action to a trustee.

Departure in pleading, may be taken advantage of by general demurrer.

APPEAL from *St. Mary's* county court.

This was an action of *debt*, brought on the 17th August 1840, by the appellant against the appellees. The plaintiff declared on a bond, executed 2nd May 1838, with condition, that *Philip Clarke* do, and shall prosecute, with effect, the writ of replevin recited in the bond, against the appellant, and shall well and truly return, &c., and pay and satisfy all damages. The defendants below, pleaded general performance, and the plaintiff

replied, that *P. C.* did not prosecute the replevin with effect, to his, the plaintiff's damage.

To this the defendants rejoined, that *Joseph*, the appellant, had petitioned for the benefit of the insolvent laws, and that *Philip Clarke* had been, in due form of law, appointed his trustee, and entitled to sue for and recover all his interests, of whatever nature, at and before the time of the institution of this suit, &c.

To this the plaintiff demurred, and the county court rendered judgment on the demurrer, for the defendants. The plaintiff appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By CRAIN for the appellant.

(No counsel appeared for the appellees.)

MAGRUDER, J., delivered the opinion of this court.

To an action upon a replevin bond, given by the first named defendant, as principal, and the other two defendants, as his securities, performance was pleaded in this suit. The replication is, that the defendant, *Clarke*, did not prosecute his writ with effect; thereupon the defendants rejoin, that the appellant was a petitioner for the benefit of the insolvent laws, and the first named defendant was appointed his trustee, and was entitled to sue for and recover all his interests of whatever nature, at and before the time of the institution of this suit. To this the plaintiff demurred, and the court overruled the demurrer.

It would, perhaps, be difficult to maintain, that the matter set forth in the rejoinder, and as it is set forth, constitutes a defence to this action. But of this it is unnecessary for us to speak. Even if, when pleaded properly, it was a bar to the action, still this rejoinder is a departure from, or relinquishment of his first plea, and a defendant is not permitted to depart from one defence which he has first made, in order to have recourse to another. If departures in pleading were to be allowed, it has been justly said, "he who has a bad cause would never

be brought to issue, and he who has a good one, would never obtain the end of his suit." For this reason, if there were no other, the demurrer ought to have been sustained. It is well settled, that a departure in pleading is matter and substance, and need not be specially demurred to. See *Archbold* on pleading, 283.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

ARTEMISA BUDD *vs.* WALTER T. BROOKE, ET AL. LESSEE.—*December* 1845.

Where an objection is made to the admissibility of evidence in mass, without specification, if any part of it is admissible for the purpose for which it was offered, it is not error in the court to overrule the objection.

Where an entire prayer is good in part, and bad in part, the court is not bound to perform the duty of counsel, analyze the subject matter of the prayer, admit a part, and reject the residue; but may content itself, in granting, or rejecting the same, according to its merits, as presented in its entirety.

A tract of land described in the patent, as lying on the south side of a creek called *C* creek, beginning at a marked white oak, standing on the west side of a little creek called *St. K's* creek, and running *E. N. E.* up *C* for breadth, the length of, &c., to a marked oak, would not by force of the terms, "*running E. N. E. up the creek*," bind on the creek, for they merely indicate the general direction of the line referred to, and the line must be run from boundary to boundary.

But where the patent further described the land, which was a tract of four sides, by stating how it was bounded on the *E. S. and W.*, and that it was bounded on the *N.* (where its first line runs,) with *C* creek, this controls the location of the first line, and requires it also to bind on the creek.

It is of no moment in what part of a patent a binding expression is found, wherever found it must be applied according to its true meaning.

In giving construction to a patent, the court is bound, as far as possible, to reconcile all its parts, and gratify the full meaning and import of every word.

The course of a line is in no case held to interpose any obstacle to the gratification of a conflicting binding call.

Deeds are to be most strongly construed against the grantor, for the benefit of the grantee.

When a tract of land called to begin at a marked tree, thence running up and with a creek two hundred perches, to another marked tree, it should be

located to run from the beginning tree, so as to bind on the creek, to the second boundary; but if that boundary cannot be found on the creek, a line may be supplied, from the end of the two hundred perches on and with the creek, to the second boundary. It would be against our practice to supply a line from such second boundary to the nearest point on the creek,

The patent for *W* described it as lying on the *S.* side of a creek, beginning at a marked oak by the creek side, and running *S. W.* down the creek for breadth, the length of one hundred perches to a marked oak, standing upon a point at the mouth of the said creek; bounding on the *S.* by a line, &c. drawn *S. E.* into the woods three hundred and twenty perches, to a bounded oak; on the *E.* by a line, &c. drawn *N. E.* from the end of the former line to a bounded hickory, that intersects a parrallel line drawn *N. W.*, to the first marked oak on the *N.*, with the said parrallel on the *W. with the said creek.* HELD:

The first line of *W* binds on the creek.

The second boundary of *W* being lost, and the spot where it stood being incapable of identification, if the creek had not been called for, the first line must be run from the beginning by its course and distance, the best means left of ascertaining its true location and terminus.

The description, "standing upon a point at the mouth of a creek," is too vague and indefinite to control the positive expressions of the patent as to course and distance; and is not of itself sufficient evidence of its locality.

Certainty is the controlling object in all locations.

A binding call for a creek, and also for a marked tree having relation to a line of a tract of land, changes the general rule, that the line calling for a lost boundary must be run by course and distance.

Where there are two imperative calls, both, if practicable, must be gratified.

Where there were two calls, one for a line to bind on a creek, and the other to terminate at a marked tree, if the latter cannot be found, nor its spot identified, the distance must be expended on the creek, and no interpolated line can be supplied.

Proof that a point shown on the plots was the outermost and most prominent point at the mouth of the creek, and the first point reached in running the first line of *W*, with a general description of such point, is not evidence tending to prove that the marked oak once stood there.

If for any reason, no matter whether it be for the reason assigned or not, the testimony objected to, be inadmissible for the purpose for which it is offered, it should be rejected by the court.

The variation of the compass has no application to a line which must be run according to the calls in the patent, which are to be gratified in the same manner, as if no course for the line were expressed in the patent.

Where defence is taken on warrant of resurvey, an ancient plot, to be given in evidence, must be correctly located under the warrant, upon the plots prepared for the trial of the cause. Where it is so unintelligibly represented upon such plots and the explanations, as that it was almost impossible for either the court or jury to say whether the locations on the plot

offered in evidence, were truly located on the plots in the cause or not, such ancient plot cannot be used as proof.

In ejectment, the plaintiff declared for a tract of land called "*Nonesuch*," and professed to locate it according to its patent. There was no location of it as a parcel of land, made up of other tracts, which had acquired a name by reputation; under such circumstances the plaintiff would not be permitted to prove, that "*Nonesuch*" was known by its reputed name as comprising such other parcels, though these were located, for the defendant could not have had any opportunity to counterlocate it by its acquired or reputed character.

Whether lands may be declared for, or recovered by their reputed name, *qr.*

To render an exemplified copy of a deed admissible in evidence, to prove title to the land which the deed professed to convey, it must appear to have been executed with all the essential forms required to warrant its enrolment under the laws of this State.

In 1684, the law required that such a deed should be acknowledged before some of the judicial tribunals or public officers, enumerated in the acts of Assembly, and recorded within one year.

The recording of a deed not authorised by act of Assembly, gives it no additional validity, and the record thus made, or the exemplified copy therefrom, is no more evidence of the existence of the deed, than would be a copy of such deed certified by any private individual.

None of the various acts prescribing the mode in which conveyances of land are to be made, direct the certificate of the acknowledgment of a deed to be recorded, except that of the acknowledgment of a *feme covert;* yet it has been a uniform custom of all recording officers, to record such acknowledgments, and their authentications of such recording, have, in all the tribunals of the State, been received as sufficient evidence of such acknowledgements.

The acts of 1692, ch. 30; 1699, ch. 42; and 1715, ch. 39; only cured such defective conveyances as had been recorded within the year.

Where a deed professes to convey part of a parcel of land, called *A*, and in giving its description by course and distance, it has but two straight lines, which can embrace no deed nor any part of a tract, it is not evidence of title or location.

The time of recording a deed, is sometimes a matter to be determined by the court, sometimes a question to be submitted to the finding of a jury.

If it plainly appears from the endorsement, officially made upon a deed or its exemplification, that it has *not* been recorded within the time prescribed by law; and there is no admissible evidence in contravention of such endorsement, then the admissibility of the deed or its exemplification, in evidence, is determined by the court; but if there be such admissible contravening testimony legally sufficient, then the time of recording, with a hypothetical instruction from the court, will be submitted to the jury.

Where it did not appear by any endorsements on the exemplification of a deed, which had been recorded, whether it had been so recorded in or out of time, it is for the jury to determine whether it was recorded in time,

and the court, without any proof upon the point, cannot conclude it was in time.

An exemplified copy of a will, made in another State, admitted to *probat* there, and certified from the records of such State, devising lands in *Maryland*, is not evidence of title in the devisee here.

Of wills of land in *Maryland*, our own courts only, are authorised to take *probat*.

The court will not direct the jury to presume conveyances to a party or his heirs, where the proof of possession, on which the presumption is founded, is not clear and sufficient, both as to the character of the possession, and its duration.

In construing a grant, it is the duty of the court, first, to ascertain what the parties intended should be effected by it.

That intention being collected from an inspection of the grant itself, it is the duty of the court to give it such an interpretation as will effectuate it, provided the terms and expressions used in the grant, will admit of such a construction.

Where a patent recited that *S*, on behalf of herself and *W* and *R*, infants, by her petition set forth, that *T*, her deceased husband, did theretofore set forth, by his petition, that there was escheat, &c., and being the first discoverer, prayed to be admitted to its purchase, &c., and paid for the same; but, before the said *T* obtained a grant, he died, having devised the aforesaid escheat land to his wife, *S*, during widowhood, and afterwards, to be equally divided between *W* and *R*, and she prayed that a grant might issue, agreeably to the bequest of the said *T*, which was granted to *S*, *W* and *R*, to have and to hold unto the said *S*, *W* and *R*, their heirs and assigns forever. HELD: that the *habendum* in the patent, should not control its premises, which was to vest in the grantees the same estate which they respectively would have taken under the will of *T*.

The technical meaning of the word premises, in a deed of conveyance, is everything which precedes the *habendum*, and it is in the premises of a deed that the thing is really granted.

The limitation contained in the *habendum* of a deed, where it is in conflict with the estate given in the premises, must be rejected, and that in the premises prevail.

A grantor shall not be allowed to contradict or retract, by any subsequent part of a deed, the gift made in the premises.

The refusal of a prayer, which ought not to have been granted, though made upon erroneous constructions of the evidence, is not error in the county court.

APPEAL from *Charles* county court.

This was an action of *Ejectment* brought on the 15th May 1838, by the appellees against the appellant. The plaintiffs declared for nineteen undivided twentieth parts of a tract of land called "*Nonesuch*," beginning at a bounded hickory

standing on the south side of *Chickamuxan* creek, the original boundary of *Nonesuch*, and running thence with the lines of the tract of land called "*Nonesuch*," corrected from the original grant of *Nonesuch* to the year 1800; south sixty-four degrees forty-two minutes west, forty perches; then north fifty-one degrees forty-eight minutes west, eight perches to *Chickamuxan* creek; then down and with said creek to *Potomac* river; then down and with said river to a free stone, the upper corner of *Fletcher's Addition;* then leaving the river and running with the lines of *Nonesuch*, south forty-seven degrees forty-eight minutes east, one hundred and twenty-five perches; then north seventy-five degrees fifty-seven minutes east, one hundred and thirty-six perches; then with the dividing line between the said tract and part of the said tract retained by *Richard Brooke*, north eight degrees east, one hundred and thirty-four perches; then with a straight line to the beginning, containing, &c.

To this declaration a certain *William Budd* appeared, &c., pleaded not guilty, and took defence upon warrant of resurvey, which was accordingly issued. His death being afterwards suggested, his devisee, the present appellant, appeared to defend the action, &c. The jury found a verdict for the plaintiff.

1st Exception. At the trial of this cause, the plaintiff, to support the issue on his part, read in evidence the patent of *Allanson's Folly*, *Wicksall*, and *Aspinal's Hope*, the plats and explanations of plaintiff's locations filed in this cause, viz:

"Grant to *Thomas Allanson* for 400 acres in *Piscataway* river. *Allanson's Folly*. *Cæcilius, &c:*—Know ye, that we do hereby grant unto the said *Thomas Allanson* a parcel of land called "*Allanson's Folly*," lying on the east side of *Piscataway* river, on the south side of a creek in the said river called "*Chincomuxen* creek," beginning at a marked white oak, standing on the west side of a little creek called "*St. Katharine's* creek," and running east-north-east up *Chincomuxen* for breadth the length of two hundred perches to a marked oak, standing by a marsh side against a hammock of trees that standeth in the marsh, bounded on the east with a line drawn

south-east from the said oak, into the woods for the length of three hundred and twenty perches to a marked oak; on the south with a line drawn south-west from the end of the former line until it intersect a parallel line drawn from the first marked oak at *Saint Katharine's* creek; on the west with the said parallel; on the north with *Chincomuxen*, containing, &c. Given at *St. Mary's*, under our great seal of our said province of *Maryland*, this 23rd day of June, in the 32nd year of our dominion over our said province of *Maryland*, Anno Domini 1663. Witness, &c."

"*John Hichinson*—patent—200 acres. *Wicksall. Cæcilius, &c.* To all persons to whom, &c:—Know ye, that we do hereby grant unto him, the said *John Hichinson*, a parcel of land called "*Wicksall*," lying in *Charles* county, on the south side of *St. Michael's* creek, formerly called "*Chickamuxon*" Beginning at a marked oak, by the creek side, being the bounded tree of the land formerly laid out for the said *Allanson*, called "*Allanson's Folly*," and running south-west down the creek, for breadth the length of one hundred perches, to a marked oak standing upon a point at the mouth of the said creek, bounding on the south by a line drawn south east, into the woods, the length of three hundred and twenty perches to a bounded oak; on the east by a line drawn north-east from the end of the former line, the length of one hundred perches to a bounded hickory that intersects a parallel line drawn north-west, to the first marked oak on the north, with the said parallel on the west with the said creek, containing and now laid out for two hundred acres, more or less, benefits thereunto belonging, *Royal Mines* excepted. To have and to hold the same unto him, the said *John Hitchinson*, his heirs and assigns forever, to be holden of us and our heirs, as of our manor of *Pangaya*, in free and common soccage, by fealty only for all manner of services, yielding and paying therefor, yearly, unto us and our heirs, at our receipt at *St. Mary's*, at the two most usual feasts in the year, viz: at the feast of the Annunciation of the *Blessed Virgin Mary*, and the feast of *St. Michael*, the Arch-Angel, by even and equal portions, the rent of four shillings sterling, in silver or gold, and for a fine upon every

alienation of the said land, or any part or parcel thereof, one whole year's rent in silver or gold, or the full value thereof in such commodities as we and our heirs, or such officer or officers appointed by us or our heirs from time to time, to collect and receive the same, shall accept in discharge thereof, at the choice of us and our heirs, or such officer or officers as aforesaid; provided, that if the said *John Hichinson*, his heirs or assigns, shall not pay unto us or our heirs, or such officer or officers as aforesaid, the said sum, for a fine before such alienation, and enter the said alienation upon record, either in the provincial court or in the county court, where the said parcel of land lieth, within, &c. Given at the five and twentieth day of November, in the six and thirtieth year of our dominion over our said province of *Maryland*, A. D. 1667. Witness, &c."

"*Henry Aspinall*—patent—150 acres. *Aspinall's Hope*. *Charles, &c.* To all persons:—Know ye, that we do hereby grant unto him, the said *Henry Aspinall*, all that tract or parcel of land called "*Aspinall's Hope*," lying in *Charles* county, and beginning at a bounded oak, bound tree of a parcel of land called "*Wicksall*," standing on the south side of *Chickamuxon* creek, on a point at the mouth of the said creek; running thence south-south-west eighty perches; thence south by east forty perches to a bounded chesnut oak; thence binding upon *Fletcher's Addition*, south-east one hundred and twenty-five perches to a bounded red oak; thence east and by north one hundred and ten perches to an oak in the line of "*Wicksall;*" thence binding on "*Wicksall*, to the first bound tree, containing, &c. Given at our city of *St. Mary's*, &c., this 16th of March, in the seventh year of our dominion over our said province, &c., Anno Domini 1681, &c. Witness our self."

The plaintiff located a plat made out by *Theophilus Hanson*, in an ejectment where *Walter Brooke's* lessee, was plaintiff, and *James Davis* was defendant, which original plat is endorsed, "filed 23rd October 1789," and which is herewith returned; all the locations made on said original plat are copied on the present plat in this case.

The plaintiff locates *Allansons Folly* according to the patent thereof, beginning at A, &c.

The plaintiff locates *Nonesuch* by the patent thereof, beginning at C, a locust, &c.

The plaintiff locates for his pretensions, a deed from *Walter T. Brooke* and *Richard Brooke* to *Lott Mason*, dated 2nd of October 1824, beginning at C, the beginning of *Nonesuch*, and running thence, &c.

The plaintiff then read in evidence the various plots, surveys and explanations of the surveyor, under the warrant in this cause, as made by directions of both parties, and which are sufficiently stated in the opinion of this court; and then, for the purpose of establishing the beginning of *Allanson's Folly*, at black A, marked on the plats in this cause, offered to give in evidence, by *James Brawner, Esq.*, a competent witness, that in the survey made prior and preparatory to the execution of the deed of *Richard Brooke*, and *Walter T. Brooke*, to *Lott Mason* in 1824, for a part of that tract or parcel of land called *Nonesuch*, beginning at a bounded hickory, standing on the south side of *Chickamuxon* creek, the original beginning boundary of *Nonesuch*, and running thence with the lines of the tract of land called "*Nonesuch*," corrected from the original grant of *Nonesuch* to the year 1800; south sixty-four degrees forty-two minutes west, forty perches; then north fifty-one degrees forty-eight minutes west, eight perches to *Chickamuxon* creek; then down and with said creek to *Potomac* river; then down and with said river to a free stone, the upper corner of *Fletcher's Addition;* then leaving the river and running with the lines of *Nonesuch*, south forty-seven degrees forty-eight minutes east, one hundred and twenty-five perches; then north seventy-five degrees fifty-seven minutes east, one hundred and thirty-six perches; then with the dividing line between the said tract and part of the said tract retained by *Richard Brooke*, north eight degrees east, one hundred and thirty-four perches; then with a straight line to the beginning, &c.

The first line of said deed, as then run in the presence of said *Lott Mason* and *Richard Brooke*, stopped at or near the point A, and the beginning of said deed was found at the point black C on the plats; that the said lines of said deed, as then

run in 1824, do correspond with the lines of said deed, as surveyed and located by the plaintiff on the plats in this cause, and that on the survey made in this cause, the said first line of said deed to *Lott Mason*, did terminate at black A, as located on the plats of this cause, and was run with the usual allowance for variation, from the date of said survey, in 1824.

And the said plaintiff accompanied said offered evidence with an offer of further evidence, to prove, that prior to the year 1824, the said *Richard Brooke*, who is yet alive and within this county, declared, that the said point marked black A, was the beginning of *Allanson's Folly;* and further offered to prove, by the deed to *Lott Mason* aforesaid, by the defendant's locations and explanations, numbered 8, made on amendment or plats 8th March 1824, and by the last will and testament of *Lott Mason*, and the last will and testament of *William Budd*,

8th explanation of the defendant is as follows, viz :

"8th. The defendant locates for her defence, in addition to *Davis' Park* above, the seizin and possession of *Richard Brooke* and *Walter T. Brooke*, of part of a tract of land called *Nonesuch*, according to the deed of said *Walter T. Brooke* and *Richard Brooke*, to *Lott Mason*. The possession and seizin of *Lott Mason* of the same land, and his dying seized and possessed. The will of *Lott Mason*, and the seizin and possession of the same land by *William Budd*, and his dying so seized and possessed. The will of said *William Budd*, and the seizin and possessions of the defendant; and she confines her defence to *Davis' Park* as above, and that part of *Nonesuch* as above; beginning that part of *Nonesuch*, as above, at C, and running thence, (according to the proof of the lines, boundaries and possessions of the parties above,) in the red drawn lines, dotted with black No. 10, 11, to *Chickamuxon* creek; then down and with said creek to *Potomac* river; then down and with *Potomac* river to B; then with the red drawn lines, dotted black, and No. 17 and 18 to A; then in the black drawn line No. 4 to K; then to the beginning, containing, &c.

The will of *Lott Mason*, dated 11th June 1828, contained the following devise :

"I give and devise to my nephew, *William Budd*, my plantation on the river called "*Nonesuch*," or commonly known by the name of "*Brooke's Ferry*," and my dwelling plantation, with the several tracts thereto belonging, which I now have a right or title to, to him and his heirs forever."

The will of *William Budd* devised to his wife, *Artemisa Budd*, "all my estate, both real and personal, during her life;" and that the said defendant claims title to the lands in dispute, through and under said *Richard Brooke*, and that the said point black A, is one of the corners of the land known and reputed as "*Nonesuch*."

The defendant objected to all such evidence for the purpose offered, and prayed the court to reject the same; but the court, (STEPHEN, C. J., KEY and DORSEY, A. J.,) overruled said objection, and allowed the plaintiff to give the evidence above offered and objected to. The defendant excepted.

2ND EXCEPTION. At the trial of this cause, the plaintiff, in addition to the evidence stated in the preceding bill of exceptions, made a part thereof, gave evidence to prove, that the second boundary of *Allanson's Folly*, stood at the point marked G on the plats filed in this cause; and then moved the court to instruct the jury, that upon the true construction of the patent of *Allanson's Folly*, its first line must be run from the true beginning thereof, as found by the jury, so as to bind on *Chickamuxon* creek, to the place where the jury shall find the second boundary of *Allanson's Folly* stood; and if the jury shall find, that the said first and second boundaries of *Allanson's Folly*, or either of them, do not stand on *Chickamuxon* creek, then it is lawful to supply a course from the point of said creek, nearest to said boundaries, or either of them respectively. Which instruction and opinion the court gave. The defendant excepted.

3RD EXCEPTION. The plaintiff, in the trial of this cause, in addition to the evidence in the preceding bills of exceptions, which are made a part of this, having read in evidence the patent of *Wicksall*, proceeded to show that it was truly located, by locating the termination of its first line, at the point marked and designated on the plats as *Moss' Point*, relying on the

several explanations of his location of *Wicksall*, filed in this cause, as the place where the oak tree stood, and which is the point of intersection on the plats of red line marked 12, and black line marked 50; but the defendant, by his counsel, objected, upon the ground that the place where the second boundary of *Wicksall*, as described in the patent, (being a marked oak,) stood, was not sufficiently designated in the plots or explanations; but the court, (KEY and DORSEY, A. J.,) were of opinion, and so instructed the jury, that by the plots and explanations, the place where the second boundary of *Wicksall*, as described in the patent, stood, was sufficiently designated at the point aforesaid, being the termination of the first line aforesaid, 12 and 50, as mentioned on the plots; to which instruction of the court, the defendants excepted.

4TH EXCEPTION. In addition to the evidence contained in the aforegoing bills of exception, which are made parts of this, the plaintiff, in further support of the issues on their part joined, and to show that the marked oak, described in the patent of *Wicksall*, as the second boundary thereof, formerly stood at the point where the second line marked 50 on the plots, intersects *Chickamuxon* creek, marked *Moss' Point*, as claimed to be located in the third bill of exceptions, offered to prove by *Francis Dunnington*, a competent witness, sworn upon the survey, that he was present at the running of the line from small *f*, on the plots, to the termination thereof, at *Moss' Point*, marked on the plots; that said point is the outermost and most prominent point at the mouth of *Chickamuxon* creek; that there were two or three small points run, but none on the river; that at ——— the mouth of the creek, and that said *Moss' Point* is the first point reached, in running first line of *Wicksall;* that near said point, the bank terminated abruptly, and seemed as if a portion might have been worn away by the action of the waters, and the lapse of time; that at said point there was no tree, nor did he ever, at any time, hear that a tree had stood upon the said point; to the admissibility of all which evidence, to prove that the marked oak, mentioned in said patent of *Wicksall*, as the second boundary thereof, stood at the said point, as located in the plots, the defendants, by their

counsel, objected; but the court, (KEY and DORSEY, A. J.,) overruled the objection, and permitted the evidence to go to the jury, for the purpose of showing where the marked oak, the second boundary of *Wicksall*, formerly stood. The defendant excepted.

5TH EXCEPTION. At the trial of this cause, in addition to the evidence contained in the preceding bills of exceptions, which are made a part thereof, the plaintiff read in evidence the patent of *Aspinall's Hope*, (previously inserted,) and proved its beginning at *Moss' Point*, where the line marked 50, strikes the water line of *Chickamuxon* creek, being the point distinguished on the plots by the words "*Moss' Point.*" And the plaintiff then claimed, to run the first line of *Aspinall's Hope* according to its true course and distance, as given in said patent, with an allowance of *thirty degrees* of variation to the westward of said patent course, drawn with the usual allowance for variation, from the date of said patent, so as to bind the said *Potomac* river; and for the purpose of claiming said allowance of variation in said line of *Aspinall's Hope*, the plaintiff offered to prove, by *James Brawner*, a competent surveyor, who made the plots and executed the surveys in this cause, that he can ascertain to a mathematical certainty, from the plats in this cause, and the locations thereon made by him, according to his several surveys, the variation required on the patent course of the first line of *Wicksall*, (from the date of said patent of *Wicksall*,) so as to bind said first line of *Wicksall* on *Chickamuxon* creek, and that the variation required for that purpose in said first line of *Wicksall*, over and above the variation usually allowed in similar cases, is thirty-eight degrees to the westward; to which evidence the defendant, by her counsel, objected, upon the ground that the first line of *Wicksall* is not located on the plots in this cause, by course and distance, and that admitting such variation to exist between the first line of *Wicksall*, according to the course and distance in the patent, and the said first line as located on the plots in this cause, it is no evidence to authorise the jury to find similar variation, in order to bind the first line of *Aspinall's Hope*, on the *Potomac* river, because the said river is not called for by the patent of *Aspinall's Hope;*

but the court, (STEPHEN, C. J., KEY and DORSEY, A. J.,) overruled the objection, and admitted the evidence to go to the jury, to which opinion and admission of said evidence by the court, the defendant excepted.

6TH EXCEPTION. At the trial of this cause, the plaintiff, in addition to the evidence contained in the preceding bills of exception, which are hereby incorporated into this, read in evidence the patent of *Aspinall's Hope*, previously inserted, and claimed to run its first line from its alleged beginning, at *Moss' Point*, as distinguished on the plots in this cause, as to which beginning, he offered evidence to the jury, according to its true course and distance, with an allowance of thirty degrees of variation to the westward, (over and above the usual allowance of variation,) so as to bind said first line on and with the *Potomac* river; and for the purpose of proving said variation on said first line, the plaintiff offered to prove, by *F. E. Dunnington*, that he was present at the survey in this cause, when the surveyor ran the lines of *Aspinall's Hope*, from said *Moss' Point* around to the beginning; that at said survey, when he was present, the said surveyor ran the black dotted line from *Moss' Point*, which is the course and distance line of said *Aspinall's Hope's* first line, with the usual allowance for variation, but did not run said line binding on *Potomac* river, and that he has known the land included within said lines, so ran around to the beginning, for more than forty years, where *William Milstead*, now dead, resided on said land, and acknowledged himself the tenant of *Commodore Walter Brooke*, now deceased, the grandfather of some of plaintiff's lessors, and the father of other of them. And that the said land is part of the tract, which he always heard and understood was called and known as "*Nonesuch.*"

And the plaintiff further offered to prove, that the persons living on said land, included in said lines as aforesaid, have for the last forty years, held, possessed, cultivated and used up to the edge of *Potomac* river; that he never heard or knew the said land to be called *Aspinall's Hope* until the day of survey; to which evidence, for the purpose aforesaid, the defendant, by her counsel, objects; but the court were of opinion, that the

evidence above offered, was admissible to go to the jury, for the purpose aforesaid, admitted the same; and to which opinion and admission the defendant excepted.

7TH EXCEPTION. At the trial in this cause, in addition to the evidence contained in the former bills of exception, which are herein incorporated, the plaintiff further to support the issue on his part joined, and for the purpose of establishing the true location of the line of the patent of *Aspinall's Hope*, calling to run, binding on *Fletcher's Addition*, from the place where the plaintiff alleges stood the chesnut oak, as called for in said patent of *Aspinall's Hope*, marked red B on the plats in this cause; and proved by *F. E. Dunnington*, to be the upper corner of *Fletcher's Addition*, offered to read in evidence a plot made out by *Theophilus Hanson*, surveyor in a cause in the general court of *Maryland*, wherein the lessee of *Walter Brooke*, was plaintiff, and *James Davis* defendant; and accompanied said offered evidence with a farther offer to read the locations made on said plot by *Commodore Walter Brooke*, the lessor of the plaintiff in said cause, together with his explanations of his locations on said plot, (all of which said locations, explanations and plot, it is hereby agreed, may be read in the Court of Appeals, together with the record in said recited cause, from the original papers in said cause, filing among the records of said general court, to have the like effect as if the same were herein fully incorporated;) and further offered to prove, by *James Brawner*, a competent surveyor, who made the plots in this cause, that he did actually run in the survey in this cause, the second line of *Fletcher's Addition*, according to the patent course and distance thereof, reversing its course and distance from red B aforesaid, with the usual allowance for variation, from the date of said patent of *Fletcher's Addition*, which line is marked on the plots in this cause 52, and at the termination of which line, no red oak could be found or proved, as called for in said patent. To all which evidence, for the purpose aforesaid, the defendant, by her counsel, objected, under the plots and explanations in this case, but the court overruled the objection, and permitted the said plot and explanations thereof, made by said *Walter T. Brooke*, to be read in evidence to the

jury, so far as the said line from red B, above described, to its termination on the plots in this cause, to which permission of the court, the defendant excepted.

8TH EXCEPTION. At the trial of this cause, in addition to the evidence contained in the preceding bills of exception, made a part hereof, the plaintiff, for the purpose of shewing that the patents of *Aspinall's Hope*, *Wicksall*, and part of the patent ot *Allanson's Folly*, as located by him on the plots of this cause, have acquired by reputation the name of *Nonesuch*, then offered in evidence by *F. E. Dunnington*, a competent witness, that he was present and sworn on the survey in this cause of the patents of *Wicksall*, *Aspinall's Hope*, and *Allanson's Folly*, as located by the plaintiff on the plots; that he has known the lands included within the lines of said patents as above located, for more than forty years past, and that the same lands included within the lines of said patents of *W., A. Hope*, and part of *A. F.*, as located by the plaintiff on the plots in this cause, he has frequently heard called in the neighborhood, previous to the institution of this suit, by the name of "*Nonesuch;*" but the said *Dunnington* at the same time proved, on cross-examination by the defendant's counsel, that he never saw *Nonesuch* surveyed; but from the holdings he believes *Nonesuch* covers more land than is included within the lines of said patents of *Wicksall*, *Aspinall's Hope* and part of *Allanson's Folly*, as above located, but the lands so included in the patents of *Wicksall*, *Aspinall's Hope*, and part of the patent of *Allanson's Folly*, as above located, are covered by the land called "*Nonesuch,*" as aforesaid. And the plaintiff then, farther to shew the extent and lines of the land called "*Nonesuch,*" offered to read in evidence the location by the defendant on the plots in this cause of a tract of land called "*Nonesuch,*" together with the defendant's explanations of her said location.

To all which offered evidence the defendant by her counsel objected, but the court overruled said objection, and allowed the plaintiff to give in evidence the testimony of said *Dunnington*, so offered by the plaintiff; and the court also decided to allow the defendant to give in evidence at her option, the mat-

ters stated by the said *Dunnington* on his cross-examination as aforesaid; and the court farther allowed the plaintiff to read in evidence the defendant's location of the land called "*Nonesuch*," on the plots in this cause, together with the defendant's explanations of said location; to all which ruling and decision of the court, the defendant excepted.

9TH EXCEPTION. At the trial of this cause, the plaintiff, in addition to the evidence contained in the preceding bills of exceptions, made a part hereof, offered to read in evidence to the jury the enrolment of a deed from *Humphrey Aspinall* to *Elizabeth Swinburne*, her heirs and assigns, dated 1st March 1684, for all that parcel of land called, lying, situate and being in *Charles* county, being part of a parcel of land called "*Allanson's Folly*," lying, &c.; also a parcel of land called "*Wicksall*," lying on the south side of *St. Michael* creek, formerly called *Chingomuxon* creek; beginning at a bounded oak, &c.; also a parcel of land called "*Aspinall's Hope*," being, &c.; and beginning at a bounded oak, a bounded tree of a parcel of land called "*Wicksall*," standing on the south side of *Chingomuxon* creek, on a point at the mouth of the said creek, &c.

"Recorded in liber L, folio 132, a book found among the records of *Charles* county court; also the deed or assignment of *William Moss* to *George Mason*, recorded in liber Z, folio 291; and the enrolment of a deed from *Humphrey Aspinall* to *Elizabeth Swinburne*, found in said last mentioned liber Z, at page 196, (the said liber Z being one of the land records of *Charles* county,) and which last mentioned deed, from said *Aspinall* to *Swinburne*, immediately precedes the enrolment in said record of said deed from *Moss* to *Mason*. "*Capt. Robert Collson*, in the behalf of *Col. Geo. Mason*, desires the two deeds following to be recorded, the said *Col. Mason* living in the colony of *Virginia*."

The first was the deed aforesaid of 1st March 1684, to which no certificate of acknowledgment was appended, though certified to be a copy by the clerk of *Charles* county court, &c.

The deed from *William Moss* to *George Mason*, dated 18th June 1705, was in confirmation of a conveyance to *Elizabeth Swinburne*, from *Humphrey Aspinall*, to which no acknowledgment was appended, nor did it appear when recorded.

And the plaintiff further offered to accompany said deeds, by reading in evidence a duly certified copy or extract of the rent rolls of *Maryland*, shewing *Wicksall* and *Aspinall's Hope* to have been in the possession of *Col. Mason*, of *Virginia*.

"Acres, 200.—Yearly rent, " 4 "—'*Wicksall*,' surv'd 3rd Feb'ry 1667, for *Thos. Allanson*, assigned *John Hitchinson*, on the S. side *St. Michael's* creek, formerly called *Chingomuxon*.—Poss'r *Coll. Mason*, in *Virginia*.—This land is said to be escheat."

In testimony that the aforegoing is a true copy from old rent roll, No. 1, for *Saint Mary's* and *Charles* counties, folio 353, one of the records belonging to, and remaining in the *Western Shore Land Office of Maryland*, I have hereunto (Seal.) set my hand and affixed my official seal, this 25th day of April 1842.

GEORGE G. BREWER,
Reg'r Land Off., W. S., Md.

"Acres, 150.—Yearly rent, " 6 "—'*Aspinall's Hope*,' surv'd 12th Feb'y 1667, for *Henry Aspinall*, at a b'd oak, a b'd tree of a parcel of land called '*Wicksall*,' on the S. side *Chingomuxon* creek.—Poss'r *Col. Mason, in Virginia*.—This land is said to be escheat, and is escheated into *Nonesuch*."

In testimony that the aforegoing is a true copy from old rent roll, No. 1, for *St. Mary's* and *Charles* counties, folio 356, one of the records belonging to, and remaining in the *Western Shore Land Office of Maryland*, I have hereunto (Seal.) set my hand and affixed my official seal, this 25th day of April 1842.

GEORGE G. BREWER,
Reg'r Land Off., W. S., Md.

Also, the will of *George Mason*, of *Virginia*, dated 29th January 1715, which contained the following devise:

"*Item.*—I give and bequeath unto my son, *Thomas Mason*, all the land which I bought of *William Moss*, in *Maryland*, and all the land that I bought of *Michael Vanlandegham*, in *Stafford* county, to him and his heirs forever."

This will was admitted to *probat* in *Virginia*, 14th Nov. 1716, and certified from the records of the court there, to be a true copy; and also certified, by the presiding judge, under the act of congress, as in due form, and by the proper officer.

And farther offered in evidence, that the said *Geo. Mason*, the testator, left at his death, as issue of his third wife, two infant sons, named *Thomas* and *Francis*, and their sole sister of the whole blood named *Sarah*—that said *Thomas* and *Francis* died while infants without issue, leaving their said sister *Sarah* as their sole heir at law, which said *Sarah Mason* intermarried with *Thomas Brooke*, and was with her said husband in the possession of the lands in dispute, whom she survived, and died previous to the year 1786, leaving surviving her, *Walter Brooke*, her eldest son, and *Richard Brooke*, her grandson, by *Richard Brooke* her second son, which said *Richard*, son of said *Sarah*, died previously to said *Sarah;* and the plaintiff further offered in evidence, that the lands in dispute were possessed by said *Sarah* during her life, and by said *Walter Brooke*, after her death, and that after his death, in 1798, the same were possessed by *Walter D. Brooke*, the eldest son of said *Walter*, until his death, in 1811, and from that time by the widow of said *Walter D. Brooke*, in behalf of his children, until 1824, when the deed to *Lott Mason* was executed; and farther gave evidence to shew, that some of the lessors of the plaintiff are the heirs at law of said *Walter Brooke*, and that others of them are the heirs at law of said *Walter D. Brooke*.

To the whole of which evidence, as above offered, the defendant objects; but the court overruled said objection, and permitted the deeds, aforesaid, and will to be read in evidence, so far as they purport to convey or devise the tracts of land called "*Wicksall*" and "*Aspinall's Hope*," as located, by the patents thereof, on the plots in this cause; and the court, (STEPHEN, C. J., KEY and DORSEY, A. J.,) allowed all the other evidence so offered to be given in evidence, and upon the said evidence so admitted, the court instructed the jury as follows: that if the jury find, from the evidence aforesaid, that the said *Geo Mason*, the above testator, and those claiming under him,

were in the exclusive, uninterrupted and adverse possession of the said tracts of land called "*Wicksall*" and "*Aspinall's Hope*," from the date of said deed from *Moss* to said *Mason*, claiming under said deed, down to the year 1824, then the jury may and ought to presume regular conveyances from the original patentees of said tracts of land to the said *Geo. Mason* and his heirs; to the admission of which said evidence, and the giving of which said instructions, the defendant excepted.

10TH BILL OF EXCEPTION. At the trial of this cause, the plaintiff, further to support the issue joined on his part, in addition to the evidence contained in the aforegoing bills of exceptions, made a part hereof, gave in evidence the patent of *Nonesuch:*

"*Sarah Brooke*, *Walter* and *Richard Brooke's* patent—450 acres—'*Nonesuch.*' *Frederick*, *&c:*—Know ye, that whereas *Sarah Brooke*, (on behalf of herself, and *Walter* and *Richard Brooke*, infants, under the age of twenty-one years,) of *Charles* county, by her humble petition to our agents for management of land affairs within this province, did set forth, that *Thomas Brooke*, the petitioner's husband, late of *Charles* deceased, did heretofore, by his petition, set forth, that there was escheat to us the following tracts or parcels of land, lying and being in the county aforesaid, and contiguous to each other viz: one hundred acres, part of a tract or parcel of land called '*Allanson's Folly*,' originally, on the 23rd June, A. D. 1663, granted unto a certain *Thomas Allanson*, for four hundred acres; '*Wicksall*,' originally, on the 25th November, A. D. 1667, granted unto a certain *John Hitchinson* for two hundred acres, and '*Aspinalls Hope*,' originally, on the 16th March 1681, granted unto a certain *Henry Aspinall*, for one hundred and fifty acres, all which tracts were the right of a certain *Henry Aspinall*, who died thereof possessed, intestate and without heirs, or making any legal disposition thereof, by which means the same became escheat to us; and the petitioner, *Thomas Brooke*, being the first discoverer, humbly prayed to be admitted to its purchase, (be it escheat by the means aforesaid, or by any other ways or means whatsoever,) and a special warrant to resurvey the same, with liberty of adding any con-

tiguous vacancy, and reduce the whole into one entire tract; and that on return of a certificate of such resurvey, he paying the purchase money, and complying with all other requisites usual in such cases, might have our grant of confirmation issue unto him thereon, which was granted him, and accordingly a warrant on the 18th January 1743, unto him for that purpose did issue; in pursuance of which warrant, a resurvey was made, and the certificate thereof returned into our land office, by which it appears the aforesaid tracts or parcels of escheat land contain the quantity of three hundred and ninety-six acres, and that there was the quantity of fifty-four acres of vacant land added, for which said escheat and vacancy, the said *Thomas Brooke*, in his lifetime, paid and satisfied unto *Benjamin Tasker, Esq*, our present agent and receiver general, for our use, as well the sum of, &c., being the purchase money agreed upon for the said escheat, as the sum of, &c., caution for the said vacancy, as also the sum of, &c., for some improvements mentioned to be made on the said vacancy; but before the said *Thomas Brooke* obtained our grant of confirmation for the same, he died, and by his last will and testament, devised the aforesaid escheat land, with the vacancy added, in manner and form following, that is to say:

"*Item.*—I give and bequeath unto my dear and loving wife, *Sarah Brooke*, all that tract or parcel of land whereon I now dwell, near *Chickamuxon*, in *Charles* county, distinguished by name, according to the patent of escheat, now in the office, together with all the negroes, stock and other personal estate I am now possessed of, to be enjoyed by her during the term of her widowhood, afterwards to be equally divided between my two sons, *Walter* and *Richard Brooke;* but if either of my before mentioned sons die without issue, then I give and bequeath his part of the aforesaid tract of land and personal estate to the survivor of my two youngest sons, *Walter* and *Richard;* but if both of my said sons should die without issue, then I will and bequeath, that the aforesaid tract of land and personal estate should be equally divided between my loving wife, *Sarah*, and my eldest son, *Thomas Brooke*, to them and their heirs forever, my wife having her first choice.

The petitioner, therefore, humbly prayed, that forasmuch as all requisites were complied with, our grant of confirmation might issue on the certificate now in the land office, agreeable to the bequest aforesaid, which we have thought fit to condescend unto, according to *Charles, Lord Baron of Baltimore, &c.* We do, therefore, in consideration thereof, and other the premises, give, grant and confirm unto them, the said *Sarah Brooke, Walter Brooke* and *Richard Brooke,* all of them, the aforesaid tracts or parcels of escheat land, now resurveyed, with the vacancy added, reduced into one entire tract, and called "*Nonesuch,*" and bounded as follows: Beginning, &c. To have and to hold the same unto the said *Sarah Brooke, Walter Brooke* and *Richard Brooke,* their heirs and assigns forever, to be holden of us and our heirs, in free and common soccage by fealty only. Sealed 27th August 1753," &c.

And the plaintiff gave proof to shew, that it was truly located by the plaintiff on the plots in this cause, the said plaintiff, at the same time, declaring, that he relied upon said patent for the purpose of claiming title to any vacancy granted by said patent, and to that part of *Allanson's Folly* included within the lines of said patent of *Nonesuch.*

And the plaintiff farther gave evidence to shew, that *Walter Brooke* survived *Sarah Brooke* and *Richard Brooke,* the other grantees in said patent; and farther offered in evidence the possession of *Sarah Brooke,* of said land, included within the lines of said patent; and after her death, previous to the year 1786, the possession of the same land by *Walter Brooke,* (the survivor of said *Sarah Brooke* and *Richard Brooke,* the other grantees in said patent;) and that *Richard Brooke,* son of the devisee, *Richard Brooke,* mentioned in said will of *Thomas Brooke,* was in possession, after his full age, of the part of the tract called "*Nonesuch,*" lying east of the black line, on the plots marked from red A to black K, and that for more than twenty years before the said suit was brought, the said *Richard,* and those claiming under him, have been in the exclusive possession of said part of *Nonesuch;* and the exclusive possession of the residue of said tract of land called "*Nonesuch,*" according to the location on patent thereof, was, by *Walter Brooke,* and after the death of

the said *Walter*, in 1798, the continued possession of the said residue of *Nonesuch*, by eldest son, *Walter D. Brooke*, until his death, in 1811, and after his death, the possession thereof by the widow of *Walter D. Brooke*, in behalf of her children, by said *Walter D. Brooke* until 1824, when the deed to *Lott Mason*, aforesaid, was executed.

And the defendant, thereupon, offered in evidence the escheat warrant granted to *Thomas Brooke;* his will as recited in the patent aforesaid; and the petition of the said *Sarah Brooke*.

Whereupon the plaintiff prayed the court to instruct the jury, that according to the true construction of the patent of *Nonesuch*, aforesaid, the said *Sarah*, *Richard* and *Walter Brooke*, the grantees therein, were joint tenants, in fee simple, of the land granted by said patent, and that if the jury find, that said *Walter* survived said *Sarah* and *Richard*, the other patentees, then the fee simple in said lands, so granted, devolved upon said *Walter;* which instruction the court granted. The defendant excepted.

11TH BILL OF EXCEPTION. Upon the evidence contained in the aforegoing bills of exceptions, the defendant prayed the court to instruct the jury, that if they find, from the evidence in the cause, that *Thomas Brooke* obtained a certificate of survey of the land in controversy, in the year 1743, as escheat land; and that he complied with all the requisites necessary to obtain a patent; and that he devised the land in controversy; and that the land in controversy, and that the persons claiming under him—*Walter Brooke* and *Richard Brooke*, their descendants, through which *Richard Brooke*, the defendant, claims title, had possessed the land in severalty, the jury might presume, from the great length of time since the date of the certificate of survey, that a grant had issued to *Thomas Brooke*, or to his devisees, in pursuance of his will; which instruction the court refused to give. The defendant excepted.

12TH BILL OF EXCEPTION. Upon all the evidence incorporated in the bills of exceptions, the defendant prayed the court to instruct the jury, that the plaintiffs cannot claim title to the lands in controversy, and maintain an action of

ejectment for the same, in virtue of the grant from the lord proprietory to *Sarah Brooke*, *Walter Brooke*, and *Richard Brooke*, because said grant is repugnant to, and in violation of the express terms of the will of *Thomas Brooke*, and is a fraud upon his devisees; provided the jury find, from the evidence in the cause, that *Thomas Brooke* obtained the escheat warrant for the land in controversy, and paid the composition money previous to his death; which instruction the court refused to give. The defendant excepted, and prosecuted this appeal.

The cause was argued before Archer, C. J., Dorsey, Chambers, Magruder and Martin, J.

By Alexander and McMahon for the appellants, and
By R. J. Brent for the appellee.

Dorsey, J., delivered the opinion of this court.

The court below was right in rejecting the appellant's prayer in the first bill of exceptions. Instead of its specifying the parts of the testimony, to which the objection was intended to apply, the court was called upon to reject it in mass. If any part of it, therefore, was admissible, for the purpose for which it was offered, the court, in overruling the prayer, committed no error. Where an entire prayer, made to the court, is good in part, and bad in part, that is, which the court ought to grant in part, and in like manner refuse, had the subject matter been properly divided, and a distinct prayer made on each subdivision, the court is not bound to assume, what appropriately belongs to counsel, the duty of analyzing the subject matter of the prayer, and admitting that which ought to be granted, and rejecting that which ought not; but the court may content itself in granting or rejecting the prayer, according to its merits, as presented in its entirety. There is no error, therefore, in the court's opinion complained of in the first bill of exceptions; some of the evidence, objected to, being undeniably admissible. See *Elliot et al. vs. Peirsol et al.*, 1 *Peters*, 338, and *Moore vs. The Bank of Metropolis*, 13 *Peters*, 310.

The appellees prayer, in the second bill of exceptions, which was granted by the court, was "to instruct the jury, that upon the true construction of the patent of *Allansons Folly*, its first line must run from the true beginning thereof, as found by the jury, so as to bind on *Chickamuxon* creek, to the place where the jury shall find the second boundary of *Allansons Folly* stood; and if the jury shall find the said first and second boundaries of *Allansons Folly*, or either of them, do not stand on *Chickamuxon* creek, then it is lawful to supply a course from the point of said creek nearest to said boundaries, or either of them, respectively." If there are binding expressions in the patent of *Allansons Folly*, which bind its first line on *Chickamuxon* creek, the granting of that part of the prayer which relates to the first boundary, would follow as a matter of course, according to the settled principles of locations, in actions of ejectment in *Maryland*, as established by the decisions of its highest judicial tribunals. But not so as to the second boundary. Instead of the line, supplied to reach that boundary, being run from the point on the creek nearest to it, the line must be run from the point on the creek where the two hundred perches, (the distance expressed in the patent,) expended on the meanders of the creek, terminate. The line from that point to the second boundary, is the line to be supplied to connect that boundary with the binding call of the first line of *Allansons Folly*, with the creek. In determining on the correctness of the remaining portion of the court's decision in this bill of exceptions, all we have to do is to ascertain, from an inspection of the patent of *Allansons Folly*, whether, from the true construction of the calls and expressions in the grant, its first line does imperatively bind on the creek. *Allansons Folly* is described in the patent as lying "on the south side of a creek called *Chincomuxon* creek, beginning at a marked white oak, standing on the west side of a little creek called *St. Katharine's* creek, and running east north east up *Chincomuxon*, for breadth the length of two hundred perches to a marked oak." Had no other more binding expression, in relation to this line, been used in the patent, the line must be run in a straight direction from boundary to boundary: the words, "running up a creek,"

not being a binding call, but merely indicating the general direction of the line referred to. This, however, is not the only binding expression in the patent, in relation to this line, as one of the bounds of the entire tract, which has four sides to it. The patent, after stating how the tract of land is "bounded" on the east, how it is "bounded" on the south, and how it is "bounded" on the west, states, that it is bounded on the north, (where its first line runs,) with *Chincomuxon*. In arriving at the true construction of this patent, it is a matter of no moment that this binding expression is used after all the other lines and bounds of the tract of land had been given. Appearing where it does, it as much controls the location of the first line as if it had immediately preceded it in the patent. By adopting this construction, we reconcile all its parts, and gratify the full import and meaning of every word in the patent, except the course of the line, which in all cases is held to interpose no obstacle to the gratification of a conflicting, binding call; but disregard this binding call, and there are virtually expunged from the patent, the words, "on the north, with *Chincomuxon*," words so emphatically inserted to declare, and establish the northern bounds of the land granted. Thus reversing one of the most just and sound principles of the law, that deeds are to be construed most strongly against the grantor, for the benefit of the grantee. And this reversal, will be made after this rule of construction has been adopted and proclaimed, in, perhaps every land trial in the State, where its influence could have been felt. Nothing but the error of the county court, in fixing the place of the beginning of the supplied line to reach the second boundary, prevents our giving to its granting the prayer of the appellees in this bill of exceptions, our entire concurrence.

Were the county court right in overruling, as it did, the appellants objection to the location of the first line of *Wicksall*, as terminating at the extremity of the point at the mouth of the creek, is the only question for our consideration under the third bill of exceptions?

The boundary being lost, and no evidence being adduced of the place where it stood, the appellees, disregarding the

course and distance, located the line as above mentioned, upon the ground, as we presume, that although no proof was offered as to the actual locality of the tree itself, yet that the patent, by binding the line on the creek, so identified the spot where it stood, that the course and distance are to be disregarded; and that by proving to what point the call referred, the termination of the line was established as at the extremity of the point. The first line of *Wicksall* calls to run south-west, down the creek, for breadth the length of one hundred perches, to a marked oak standing upon a point at the mouth of the said creek, and this line is made to bind on the creek, by language almost identical with that, which we have said binds the first line of *Allansons Folly* on the creek. But, for this binding call, under the proofs in this cause, we think that the location of the first line of *Wicksall*, in disregard of its course and distance, would be manifestly erroneous. Where a bounded tree, called for as standing at the end of a line, cannot be found, nor the particular spot where it stood, be identified, to run the line by its course and distance, is the best means left of ascertaining its true location and terminus. The fact that the boundary called for is represented by the patent as standing upon a point at the mouth of a creek, is, in the event of its loss, too vague and indefinite to control the positive expressions of the grant, as to course and distance. By pursuing the course and distance, we have the fixed and specified means of obtaining the identity of the spot where the line is to terminate. To reject the course and distance, is to determine, that the particular spot, on which the boundary stood, is ascertained with reasonable certainty. The statement in the patent, that it stood on a point at the mouth of a creek, is not, of itself, sufficient evidence of its identical locality. Such a point may be ten feet long, or it may be a mile long, and it may be subject to the same uncertainty as to its breadth. There is no semblance of analogy between such points and mathematical points. The expression, standing on a point at the mouth of a creek, identifies no particular spot as that whereon the tree called for stood. The expression in the grant is equally gratified, whether you locate the tree on the north end, or the south end, the east

side, or the west side of the point. The call for a bounded tree, standing on a point at the mouth of a creek, where the tree, and spot where it stood, are lost, and are both incapable of ascertainment with a reasonable degree of certainty, ascertains with less certainty than the course and distance, the termination of the line, and therefore, cannot control them; certainty being the controlling object in all locations. But the peremptory, binding call for the creek, in the patent of *Wicksall*, changes, in this case, the general rule, that a line calling for a lost boundary must be run by its course and distance. If the tree had not been lost, there would have been two imperative calls, both of which, if practicable, must have been gratified. The line must have terminated at the tree, and it must have been made to bind on the creek, until its distance (that is number of perches,) was exhausted at some spot on the margin of that projection of land at the mouth of the creek, called the point. And if the tree called for had stood at some distance from that spot, a line, not called for in the patent, must be run from it to such boundary. See *Dorsey's Ejectment*, 69 and 70, and the diagram in the same book, 50. But if, as here, the bounded tree be lost, and the spot where it stood incapable of ascertainment with a reasonable degree of certainty, there can be no such interpolated line, and the line in question must terminate at the spot above mentioned. There is nothing in the calls in the patent of *Wicksall*, which terminates its first line at the extreme verge of *Moss' Point*. In perfect consistence with those calls, it might have terminated at any other place upon the margin of that point. We, therefore, think the court below erred in assuming, as a matter of law, and so instructing the jury, that the termination of the first line of *Wicksall* was at the north western extremity of *Moss' Point*.

In overruling the appellant's objection to the testimony of the appellees in the fourth bill of exceptions, we think the county court erred, not only for the reasons we have stated, as to the second bill of exceptions, but upon another ground:—the testimony offered, had no tendency to prove where the marked oak stood, and, therefore, should have been rejected on account of its immateriality.

There is error in the court's opinion, overruling the appellant's objection to the testimony offered in the fifth bill of exceptions. If for any reason, no matter whether it be for the reason assigned or not, the testimony objected to, be inadmissible for the purpose for which it is offered, it should be rejected by the court. The appellees having proved the beginning of *Aspinall's Hope* to be "at the point distinguished on the plots, by the words, *Moss' Point*," claimed to run the first line of *Aspinall's Hope* according to its courses and distances, as in the patent thereof, "with an allowance of thirty degrees of variation to the westward of said patent course, drawn with the usual allowance for variation, from the date of said patent," so as to bind on the *Potomac* river; and for the purpose of sustaining said allowance for variation in the first line of *Aspinall's Hope*, offered to prove, by *James Brawner*, a competent surveyor, who made the plats and executed the surveys in this case, that he could ascertain to mathematical certainty, from the plots in this cause, and the locations made by him, according to his several surveys, the variation required in the patent course of the first line of *Wicksall*, (from the date of said patent of *Wicksall*,) so as to bind said first line of *Wicksall* on *Chickamuxon* creek, and that the variation required for that purpose, in said first line of *Wicksall*, over and above the variation usually allowed in similar cases, is thirty-eight degrees to the westward. To this evidence the defendants objected; but the court overruled the objection, and permitted the evidence to go to the jury. In so doing, we think the county court was clearly in error. The testimony offered, had no connection with, or bearing upon the question, as to what correction ought to be allowed for the variation of the magnetic needle, to ascertain the true original location of lands held by courses and distances. To open the door to such proof, under the circumstances in which it was offered, would unsettle the rights of all land-holders, whose estates are held by courses and distances, and introduce a multiplicity of litigation and confusion in land titles, of which the foresight of man can form no estimate. It would unsettle the whole theory of allowance for variation in the surveying of lands, as practised under and

established in *Maryland*, and substitute in its place, a standard ever changing and utterly uncertain, and which had not the slightest relevancy to the allowance which ought to be made, according to the established principles and experience of ages, upon the subject. The first line of *Wicksall*, by the terms of its patent, binds on *Chickamuxon* creek, and in running it, therefore, its course is rejected, and the line run in conformity to the imperative call, in the same manner as if its course had not been expressed in the patent. In locating the first line of *Wicksall*, you do not run it the course expressed in the patent, corrected for variation by such a number of degrees, as will make it conform to the binding call imposed on it; but you reject altogether the course in the patent, and run the line the course which will gratify the call, in the same manner as if no course for the line were expressed in the patent. You gratify the call, and shape your course by the point of the needle, and the question of variation has nothing to do with such a proceeding. If a due south line, with a binding expression in the patent, which takes it due north, is to be located, the surveyor must run the line due north by the point of the needle, and in such a case, he never dreams that he is doing what, if the testimony objected to be admissible, we assume that he has done, viz: corrected the course in the patent one hundred and eighty degrees, as an allowance for variation. In changing the course to gratify a call, the line is run accordingly, either to the east or to the west, without regard to the fact, whether, from the date of the original survey to the time of the location of the line, the variation of the needle has been to the east or to the west, and, consequently, no such fact could be deduced from it, as that for which such testimony has been offered in the case before us.

Of the opinion of the county court, in the sixth bill of exceptions, we think the appellant has equal cause to complain. The court ought to have rejected the testimony, for the purpose for which it was offered, as well for the reasons assigned in the preceding bill of exceptions, as on account of its immateriality and irrelevancy to the subject matter, which was designed to be deduced from it. It had not the slightest tendency to prove,

that an allowance of thirty degrees, over and above the usual allowances, ought to be made, for the purpose of binding on the *Potomac* river, the first line of *Aspinall's Hope*. What was the testimony offered in this bill of exceptions, to establish this unnatural and irrational allowance for variation? First, the patent of *Aspinall's Hope*, which gave not the slightest countenance to such a deduction; and secondly, the oral proofs that the tenants of *Walter Brooke*, and those claiming under him, had possessed the land lying between the first and second line of *Aspinall's Hope* and the *Potomac* river; but that the witness never knew or heard, that the land so possessed was called *Aspinall's Hope;* on the contrary, that he always heard and understood, that it was called and known as "*Nonesuch*," a tract of land located in this cause, as containing the land in question. How this proof had any tendency to establish this extraordinary allowance for variation, we are unable to discover.

The only ground for an objection to the testimony offered in the seventh bill of exceptions, which we can discover, is, that the locations made of the plot offered in evidence, have been so unintelligibly represented on the plots and explanations in this cause, that it was almost impossible for either the court or jury to say, whether the locations on the plot offered in evidence, were truly located on the plots filed in this cause. And upon no other principle, than its apparently correct location, could it be given in evidence, to support any of the locations made on the plots before us. It is true, that the surveyor has certified, in his explanations returned with the plots, that "the plaintiff locates a plot made out by *Theophilus Hanson*, in an ejectment suit, wherein the lessee of *Walter Brooke* was plaintiff, and *James Davis* was defendant, which said plot is endorsed, 'filed 23rd of October 1789.' " "All the locations made on said plots, are transferred or copied on the plots returned in this cause, and are to be taken and considered, to all intents and purposes, the same as original locations in this cause, as well as evidence of the locations made by *Walter Brooke*, in said ejectment suit; and will also be relied on by the plaintiff, as explanatory of the grounds of said ejectment, the finding of the jury, and the possession delivered to said *Walter Brooke*,

by judgment of the *General Court of Maryland.*" But how the lines thus located, are distinguishable from the other locations on the plots; where they commence or terminate; with what calls, or by what courses and distances they are run, we are left to speculate on the wide ocean of conjecture and uncertainty, without chart or compass to guide us, on our hopeless voyage of discovery. If there be any case in which, on account of an almost infinitude of locations, and a failure of the surveyor to file with the plots returned, the explanations requisite to their comprehension by the court and jury, this court would be justified in reversing the judgment and remanding the case for a new trial,—the present is a fit case for the exercise of such a power.

Had the plots and explanations returned by the surveyor in this cause, identified, as they ought to have done, the lines to sustain the location, of which the plot offered in evidence was adduced, and it had appeared that they had been truly located, then, would the plot offered in evidence have been clearly admissible. But, in consequence of the defects of the plots and explanations of the surveyor, it not appearing affirmatively to the court, that the lines in question had been truly located, conformably to their location on the plot from which they were taken, on the objection raised to the plot offered in evidence, we think the court below ought to have rejected it.

In admitting, for the purpose for which it was offered, the testimony of the appellees, objected to by the appellant in her eighth bill of exception, we also impute error to the court below. The plaintiffs below, had not located *Wicksall, Aspinall's Hope*, and part of *Allanson's Folly*, as a body of land, which had acquired the name of *Nonesuch*, by reputation. On the contrary, their location of *Nonesuch*, professed to have been made according to its patent; and the location of *Nonesuch*, as made by the appellant, and offered in evidence by the appellees, is also stated to have been made agreeably to the patent. There being, then, no location of *Nonesuch*, as a parcel of land which, by reputation, had acquired that name, there could have been no counter-location thereof, and consequently, the evidence offered to prove it, was out of the issues in the cause.

In what we have said on this bill of exceptions, we are not to be understood as intimating any opinion, that, under the circumstances of this case, (if, indeed, under any circumstances it could be done,) the appellees could recover the lands in controversy, under the name of *Nonesuch*, as a name acquired by reputation.

Had the county court, in the ninth bill of exceptions, as it did in the first, have contented itself with simply overruling the general objection raised to all the testimony offered, and leaving it, as being no otherwise objected to, to go to the jury, for the reasons assigned by us in the examination of the first bill of exceptions, the course pursued by the county court would have been sustained by this court. But such was not the course pursued by the court below. It did not content itself with overruling the objection made, and permitting the testimony to pass to the jury as otherwise unobjected to, but it proceeded to analyse the proof, and to pronounce its opinion to the jury upon the admissibility of several portions of it, and asserted all the evidence offered, to be admissible, and gave thereon an instruction as to its legal effect and operation. In doing so, the court did not, as in the first bill of exceptions, assume a mere passive attitude by permitting testimony to go to the jury, to which no valid objection had been urged; but its action was positive; it decided, that not only were certain enumerated portions of the testimony competent to go to the jury, but that all of it was admissible before them. If then, any portion of the testimony offered in this bill of exceptions (material to the issues on the trial before the jury,) was incompetent, the judgment of the county court must be reversed. The duty, therefore, to some extent, devolves upon us, of examining the several parts of the evidence submitted to the jury, to see how far each and every portion of it is admissible. The first part of the testimony, the admissibility of which is sanctioned by the county court, is the copy of the deed from *Humphrey S. Aspinall* to *Elizabeth Swinburne*, and the copy of the deed from *William Moss* to *George Mason*, and the copy of *George Mason's* will. To render an exemplified copy of a deed, admissible in evidence, to prove title to the land which the deed

professes to convey, it must appear to have been executed with all the essential forms required to warrant its enrolment under the laws of this State. In 1684, (the date of the alleged deed from *Humphrey S. Aspinall* to *Elizabeth Swinburne*,) the act of Assembly required that such a deed should be acknowledged before some of the judicial tribunals or public officers, enumerated, and recorded within one year. From the copy before us, it does not appear that this deed had been acknowledged pursuant to the provisions of the act of 1674, ch. 2. The recording of it, therefore, not being authorised by the act of Assembly, gave to it no additional validity, and the record thus made, or the exemplified copy therefrom, is no more evidence of the existence of the deed, than would be a copy of such deed certified by any private individual. This objection to the admissibility of the copy, has been attempted to be obviated by the assertion, that the act of 1674, ch. 2, did not require the recording of the certificate of the acknowledgment of a deed for lands. It is a sufficient answer to this assertion to state, that it is sustained by no judicial sanction in this State. That none of the various acts of Assembly prescribing the mode in which conveyances of land are to be made, direct the certificate of the acknowledgment of a deed to be recorded, except the certificate of the acknowledgment of a *feme covert*. Yet, from the passage of the act of 1674 to the present day, it has been the uniform custom of all recording officers to record such acknowledgments; and their authentications of such recording, have, in all the judicial tribunals of the State, been received as sufficient evidence of those acknowledgments. Such efficacy could not have been given by courts of justice to such authentications, unless they regarded such recording, as a compliance with the requisitions of our system of registration. The ruinous consequences to land holders resulting from this novel suggestion, are too obvious and alarming to permit its receiving, for a moment, the sanction of this court.

The deed from *Aspinall* to *Swinburne*, derives no validity from the confirmatory or curing provisions in the acts of 1692, ch. 30; 1699, ch. 42; and 1715, ch. 39; or either of them: those provisions only curing such defective conveyances, as

had been recorded within the year. That deed bears date on the first day of March 1684, and by an indorsement upon it, properly recorded with it, it is apparent that it could not have been recorded prior to the 10th day of December 1705, and, therefore, can derive no aid from the confirmatory enactments of 1692, 1699, and 1715. It would have been otherwise, had the deed appeared to have been recorded within the year. That is, it would have been admissible to sustain any locations made according to its courses, distances, and calls, upon the plots in the cause. To that extent it was admissible to shew title, or sustain the correct locations of *Wicksall* and *Aspinall's Hope*, but not to shew title to, or sustain the appellees locations of part of *Allanson's Folly*, because the deed professes to convey "part of a parcel of land called *Allanson's Folly*," and in giving its description by courses and distances, it has but two straight lines, which can embrace no deed, or any part of the tract of land called "*Allanson's Folly*."

But it is alleged, that the time of the recording of a deed is a matter of fact to be determined by the jury, and not a matter of law, resting in the decision of the court. To this, as an universal proposition, we cannot give our assent. The time of the recording of a deed is, sometimes, a matter to be determined by the court, and sometimes a question to be submitted to the finding of a jury. If it plainly appears, from indorsements officially made upon a deed, or its exemplification, that it has not been recorded within the time prescribed by law; and there is no admissible evidence in contravention of such indorsements, then the admissibility of the deed, or its exemplification in evidence, is determined by the court without any reference on the subject, to the jury. But if there be such admissible contravening testimony, as to the time of the recording of the deed, legally sufficient to be left to the jury to warrant them in finding that the deed was recorded in due time, then is the question, as to the time of recording of the deed, to be submitted with an hypothetical instruction from the court to the jury. As to the exemplification before us, there is no such contravening testimony, and the objection taken to its admissibility ought to have been sustained by the court.

In regard to the exemplified copy of the deed from *William Moss* to *George Mason*, the facts upon which its admissibility depends, are somewhat variant from those connected with the deed from *Humphrey S. Aspinall* to *Elizabeth Swinburne*. As to the former deed, it does not appear by any endorsements upon it, whether it was recorded in time or out of time. If in time, though unacknowledged and not indented, by the curing influence of the act of 1715, ch. 47, it would have been admissible to prove title to *Wicksall* and *Aspinall's Hope*, or to sustain locations made in conformity to it. In 1705, the date of the conveyance from *Moss* to *Mason*, a deed to be effectual for the conveyance of land, must have been recorded in one year. He who asserts title under such a conveyance, must prove its enrolment within the period prescribed by law. The *onus probandi*, in that respect, rests on him. The deed, it is true, is proven to have been recorded; but as to the time of its enrolment, there is not a shadow of proof. Why such proof, so accessible to both parties, was not produced, it is difficult to imagine. Had it been adduced, its sufficiency, in point of fact, to establish the enrolment of the deed within the requisite period, was a matter for the determination of the jury, not of the court. The county court, therefore, we think was in error, in assuming the jurisdiction which appropriately belongs to the jury. And the error is apparent, when we advert to the circumstance, that the court drew its conclusion, that the deed was enrolled in time, without any proof sustaining such an inference.

As respects the copy of *George Mason's* will, offered in evidence by the appellees, we cannot entertain a momentary doubt of its inadmissibility. Of wills of land in *Maryland*, our own courts, only, are authorised to take probate. If a title to lands in this State, is derived under *Mason's* will, its existence and validity must be proved by other testimony, than a mere exemplified copy of its probate, in a court in the State of *Virginia*.

From the instruction given by the court to the jury, in this bill of exceptions, we also dissent. This court having determined, that the copies of the deeds from *Aspinall* and *Moss*, and of the will of *Mason*, were inadmissible, as evidence under

the circumstances in which they were offered; and the appellees having shewn by their own testimony, that *Sarah Mason* was not an heir at law of *George Mason*, and as such, entitled to the lands in controversy, her possession not being lawfully derived from him, cannot be so connected with his, that from the long continuance of the possession by the two, (till 1824,) regular conveyances, from the patentees of *Wicksall* and *Aspinall's Hope*, might be presumed to the said *George Mason*. The possession of *Sarah Mason* being out of the question, the only possession on which this presumption of "regular conveyances from the original patentees" of *Wicksall* and *Aspinall's Hope*, is founded, is that of *George Mason*. And what is the proof of possession of these two tracts of land, and of its continuance by *George Mason*? The only evidence of his possession, is an extract of an entry from old rent roll, No. 1, for *St. Mary's* and *Charles* counties, which states *Col. Mason*, of *Virginia*, to be the possessor. But when that entry was made, or for how many years it was continued; whether the possession lasted for one year or twenty years, the admissible evidence in the cause, furnishes us with no means of ascertaining. For aught that we can know, *Col. Mason* may have been an intruder, and possessor for one year only. To make the presumption required in support of such possession, as that proved to have been in *Col. Mason*, cannot meet the approval of this court. Nor can we readily perceive how the county court, after sustaining the validity of the deeds from *Humphrey S. Aspinall* to *Elizabeth Swinburne*, and from *William Moss* to *George Mason*, could, in opposition to those deeds, and to their utter exclusion, direct the jury to presume regular conveyances from the original patentees of *Wicksall* and *Aspinall's Hope*, to *George Mason*. If the deeds of *Humphrey S. Aspinall* and *William Moss* were sanctioned by the court, they repelled the idea of conveyances from the original patentees to *George Mason;* and the only presumption of grants that could, consistently with its own decision, be raised by the county court, was from the patentees of *Wicksall* and *Aspinall's Hope* to *Humphrey S. Aspinall*.

Having, already, stated sufficient grounds for the reversal of the judgment of the county court upon the ninth bill of exceptions, we forbear to scrutinize other portions of the testimony therein detailed, to ascertain if they be not obnoxious to the objection taken to their admissibility.

The appellees, in the tenth bill of exceptions, "prayed the court to instruct the jury, that, according to the true construction of the patent of *Nonesuch*, aforesaid, the said *Sarah*, *Richard* and *Walter Brooke*, the grantees therein, were joint-tenants, in fee-simple, of the land granted by the patent; and that if the jury find, that said *Walter* survived said *Sarah* and *Richard*, the other patentees, then the fee-simple in said lands so granted, devolved upon the said *Walter*." This instruction the court granted, and the correctness of their so doing, is the question we must decide, under the tenth bill of exceptions. In construing a grant, it is the duty of the court, first, to ascertain what the parties intended should be effected by it. And that intention being collected from an inspection of the grant itself, it is the duty of the court to give to it such an interpretation as will effectuate that intention, provided the terms and expressions used in the grant, will admit of such a construction. Looking to the premises only in this grant, we think that its design, and the intention of the parties to it, are too clearly and fully expressed, to admit of any reasonable doubt as to what they were. It states, in substance, that the grantees had applied for the grant to be issued to them, agreeably to the devise or "bequest" in the last will and testament of *Thomas Brooke*, and that the grantor had consented to make the grant accordingly. And it proceeds to state, that "therefore, in consideration thereof;" that is, in pursuance of such intent and agreement, the grantor did "give, grant and confirm unto the grantees, the aforesaid tracts or parcels of escheat land, now re-surveyed, with the vacancy added, reduced into one entire tract, and called *Nonesuch*, and bounded as follows," &c. If this grant had issued without the "*habendum*," could a serious doubt have been urged, but that it would have fully effectuated the design and intention of both the grantor and grantees; and that the tract of land called "*Nonesuch*," would

have vested in the grantees, agreeably to the recited clause in the last will and testament of *Thomas Brooke?* We think not. It matters not that it is given to the grantees, without any express words of inheritance. The terms used in the granting clause itself, sufficiently declare the intention of the grantor, to transfer to the grantees the same interests and estates in the lands granted, with which it was designed to invest them, by the last will and testament of *Thomas Brooke;* and whether such declared intent preceded or succeeded the words, give, grant, &c., our construction of this clause of the grant, would be in nowise changed thereby.

"The technical meaning of the word, premises, in a deed of conveyance, is every thing which precedes the *habendum;*" "and it is in the premises of a deed, that the thing is really granted." The premises of the grant before us, passing, as we conceive, the lands granted in conformity to the last will and testament of *Thomas Brooke*, and the declared intent of both grantor and grantees, the next enquiry to be answered is, has the *habendum* such controlling influence over the grant as to defeat the estates created by the premises, and substitute, in their places, entirely different estates, contrary to the manifest intent of the parties to the grant. According to our construction of the grant, made by the premises, it is in direct conflict with that contained in the *habendum*. Both cannot prevail. One must overrule the other. Which takes precedence, is the question? In our opinion, the limitation contained in the *habendum* must be rejected, and the estates given in the premises must prevail. In 2 *Lomax's Dig.*, 188, it is stated, that "where there are two clauses in a deed, of which the latter is contradictory to the former, there the former shall stand." And in page 215, of the same book, it is said, that "where the *habendum* is repugnant and contrary to the premises, it is void, and the grantee shall take the estate given in the premises. This is a consequence of the rule already stated, that deeds shall be construed most strongly against the grantor; therefore he shall not be allowed to contradict or retract, by any subsequent part of the deed, the gift made in the premises."

It follows from the views we have expressed, that we think the county court erred in granting the appellees prayer in the tenth bill of exceptions.

It is, we think, apparent, that the prayer of the defendant below, in the eleventh bill of exceptions, has not been correctly transcribed in the record transmitted to this court, it being, in a great measure, unintelligible. We, however, have no alternative but to assume, that the county court acted upon it in the form in which it appears before us; and, therefore, on account of its unintelligibility, properly rejected it.

We, also, concur with the county court in its refusal to grant the defendants prayer in the twelfth bill of exceptions, but for very different reasons from those which influenced the action of that tribunal. Under the act of 1825, ch. 117, the only point, decided by the court below, was the insufficiency of the cause assigned, in bar of the appellees right to recover. The prayer was, "that the plaintiffs cannot claim title to the lands in controversy, and maintain an action of ejectment for the same, in virtue of the grant from the *Lord Proprietary* to *Sarah Brooke*, *Walter Brooke*, and *Richard Brooke*, because said grant is repugnant to, and in violation of the express terms of the will of *Thomas Brooke*, and is a fraud upon his devisees." In responding to this prayer, the county court was bound to give its true construction to this grant, so far as concerns the objection urged against it. That construction, this court have said, so far from being repugnant to, is in perfect consonance with the will of *Thomas Brooke*, and is, consequently, no fraud upon his devisees. In this view of the question we must say, that the court below committed no error in its refusal of the appellants prayer in her twelfth bill of exceptions.

We concur with the county court in its rejection of the appellants prayers in the first, eleventh and twelfth bills of exceptions; but dissenting from its instruction to the jury in the second and third bills of exceptions, and from its overruling the appellants objections to the evidence offered in the fourth, fifth, sixth, seventh, eighth and ninth bills of exceptions, and from

its granting the appellees prayer in the tenth bill of exceptions, we reverse its judgment.

JUDGMENT REVERSED.

ALEXANDER McKEE, ADMINISTRATOR OF JAMES McKEE, *vs.* JAMES BADEN.—*December* 1845.

In an action by an administrator, to recover the value of goods sold and delivered by him, where the issues were made up on the pleas of *non assumpsit*, and payment, the defendant proved the admission of the plaintiff to the defendant, that there was no necessity for the defendant giving his notes for the articles purchased, as he, the plaintiff, would give the defendant credit for the amount, on a judgment due from the plaintiff's intestate to the defendant. There was no evidence that the defendant consented to the arrangement. HELD, no defence to the action.

The plaintiff then proved, that the judgment in question had been assigned by the defendant prior to the sale; HELD, that if the plaintiff was ignorant of the assignment, at the time of his admission, and if the defendant, at the same time, concealed the fact of such assignment from him, it was a fraud on the plaintiff.

APPEAL from *Prince George's* county court.

This was an action of *assumpsit* brought by the appellant on the 16th December 1842, against the appellee, for articles sold and delivered by the appellant to him, to amount of $212.50. The defendant pleaded *non assumpsit*, and payment, on which issues were joined.

At the trial of this cause, the plaintiff first proved to the jury, by the testimony of *John L. Townshend*, the sale and delivery of articles charged in the account on which the present suit is brought, at a sale made by the plaintiff as the administrator of one *James McKee*, at the prices therein charged.

The defendant then gave in evidence to the jury, that the plaintiff admitted to defendant, in the presence of witness, the said plaintiff's intestate, *James McKee*, was indebted to defendant in a larger sum than the amount of defendant's purchase at the sale of said plaintiff, as administrator of said *James McKee;* and that there was no necessity for defendants giving him his note for the articles purchased at the sale, and for the

value of which this action is brought, as he, the plaintiff, would give defendant credit for the amount so purchased on the debt due from plaintiff's intestate to said defendant.

The plaintiff objected to the admissibility of said evidence, under the pleadings and issues in the cause, and prayed the court so to instruct the jury. But the court, (C. DORSEY, A. J.,) refused to grant the instruction, and were of opinion and so instructed the jury, that the aforesaid evidence, if believed by them, amounted in law to payment of said account for the articles so as aforesaid sold and delivered by the plaintiff to the defendant, if they should find from the evidence, such sale and delivery; to which opinion of the court, and the refusal to grant the instruction as prayed, the plaintiff excepted.

The plaintiff then, for the purpose of explaining to the jury the agreement, so as aforesaid given in evidence by the defendant to the jury, read to the jury, from the dockets of *Prince George's* county court, the record of a judgment rendered in said court in favour of the said defendant against the said *James McKee*, which judgment appeared, from the said docket, to be entered for the use of one *Samuel Childs*, at the April term 1827; and for the further use of *Hopkins* and *Moore*, at subsequent terms of said court, and continued so entered to the use of *Childs* and *Hopkins* and *Moore*, down to the time of the said sale, and the time of the agreement aforesaid; and then proved, that the said agreement was entered into with reference to the said judgment; and that the plaintiff and defendant, upon said agreement, referred to the aforesaid judgment, and none other.

The defendant further proved to the jury, that the plaintiff admitted to witness, in a conversation held with him since the institution of this suit, that after the said judgment had been entered for the use of *Childs*, the defendant in this action gave the plaintiff's intestate an order on said *Childs* (who had sold defendant's tobacco,) for the amount due on said judgment to *Childs*, and that the said judgment then belonged to said defendant.

The plaintiff then prayed the court to instruct the jury, that if they find, from the evidence in the cause, that at the time

the plaintiff made the aforesaid agreement, it had relation to the aforesaid judgment; and if they further find, that said judgment was assigned, at the time, to the said *Childs* and *Hopkins* and *Moore*, and stood on the docket of the court so assigned, that then said agreement to give the defendant credit, if believed by them, was inoperative and void for the want of consideration. But the court refused to grant the prayer of the plaintiff's counsel, and instructed the jury, that said agreement, if believed by them, did operate in law as a payment of said account, although they might find from the evidence, that it related to said judgment, and that said judgment was assigned to the said *Hopkins* and *Moore* at the time of said agreement; provided they further find from the evidence, that the plaintiff had no knowledge of said assignment at the time of said agreement. To which opinion of the court, and to their refusal to grant the plaintiff's prayer, the plaintiff also excepted.

The verdict and judgment being against the plaintiff, he appealed to this court.

The cause was argued before Archer, C. J., Dorsey, Spence, Magruder and Martin, J.

By T. F. Bowie for the appellant, and
By D. C. Digges for the appellee.

Magruder, J., delivered the opinion of this court.

The plaintiff sold goods, a part of the estate of his intestate, *James McKee*, to the defendant, and to recover the value of those goods, this suit was instituted in *Prince George's* county court. The sale of the goods, and at the prices charged, was proved, and the plaintiff was entitled to a verdict for the sum claimed, unless in the testimony introduced into the exception taken in the case, there is to be found proof that the claim was discharged.

It appears, that sometime previously to the sale, a judgment was recovered against the plaintiff's intestate, upon a claim which the defendant had against him; and it is insisted, that an agreement between the parties to this suit, will defeat the plaintiff's action. All that the exception tells us, in relation to this agreement, is to be found in these words:

"The plaintiff admitted to the defendant, in the presence of witness, that there was no necessity for the defendant giving his notes for the articles purchased at the sale, and for the value of which this action is brought, as he, the plaintiff, would give the defendant credit for the amount so purchased, on the debt due from the plaintiff's intestate to said defendant."

It is impossible that such testimony could be of any advantage to the defendant. The testimony must be misstated, though it is out of our power to correct it. The attempt on the part of the defendant, it is presumed, was to prove an agreement between himself and the plaintiff, that one of them proposed, and it was agreed to by the other, that the amount of the goods purchased, and which was less than the amount of the judgment, should be deducted, by the defendant, from the amount of the judgment; yet it nowhere appears, that the defendant consented to any such arrangement.

The plaintiff, then, to show that the defendant, if he had entered into such an agreement, could not have executed it, offered proof, that the judgment of the defendant had been assigned to another person; and the plaintiff, thereupon, asked the court to instruct the jury, that if the agreement had relation to that judgment, (of this there was proof,) and the judgment had been assigned previously to other persons, (as was proved,) then the agreement was inoperative, &c.

The court, after refusing to give this instruction, proceeded to instruct the jury, that "said agreement, if believed by the jury, did operate in law as payment of said account, although they might find from the evidence, that it related to said judgment, and that said judgment was assigned to said *H.* and *M.*, at the time of said agreement, provided they further found from the evidence, that the plaintiff had no knowledge of said assignment at the time of said agreement."

We are of the opinion, that if the plaintiff was ignorant, at the time of the agreement for the assignment, the defendant could have no right to the credit which he claimed. If, in truth, the defendant did make the agreement, and at the time, concealed from the plaintiff the assignment of the judgment, then he practised a gross fraud upon the plaintiff. Nor can it

be understood, how the defendant could pay this claim with the judgment, which the instruction assumes, had become the property of others.

The pleas in this case, are *non assumpsit* and payment, and it has been made a question, whether the testimony will support either of those pleas, or whether, in order to avail himself of it, the defendant must not plead accord with satisfaction. This question may properly arise when a different statement of facts is furnished. All that can be said at present is, that there is in the record no agreement, which upon any issues that could have been joined, would have entitled the defendant to a verdict, or have warranted the instructions that were given.

JUDGMENT REVERSED AND PROCEDENDO ORDERED.

T. BALDWIN, USE OF J. OWENS, *vs.* ROBERT WRIGHT AND DEWIT KENT, No. 8.—T. BALDWIN *vs.* ROBERT WRIGHT, No. 9.—SAME *vs.* SAME, No. 11.—ELI BALDWIN, ET AL. *vs.* ROBERT WRIGHT, No. 12.—JOSEPH OWENS, *vs.* ROBERT WRIGHT, No. 14.—*December* 1845.

Where a defendant in a judgment moves to quash a *ca. sa.* issued against him, upon the ground that he had attached the debt due by him to the plaintiff in his own hands, he ought to show that the attachment was regularly levied in his hands.

An actual attachment laid by the defendant in his own hands, would be decisive against his liability to be taken in execution for the same debt, and the pendency of the attachment would furnish a ground for quashing the *ca. sa.* until it be decided.

A defendant may plead a pending attachment against the claim of the plaintiff.

An attachment issued without any return of service, is not attended with the same consequences.

The overruling a motion to quash an attachment is not the subject of an appeal. It is only interlocutory matter.

The process of attachment on judgment, under the act of 1715, ch. 40, sec. 7, is considered as an execution, and governed by the same principles.

An alias attachment cannot be sued out before the first is returned. The second writ is grounded on the first, and the return thereof.

It cannot be assumed from the neglect or failure of a sheriff to return an attachment, that there has been no service of it, and unless such fact was made to appear to the court, it would not be justified in issuing a second attachment.

Where a plaintiff assigned a judgment before process of attachment was sued out against him by one of his creditors, the attaching creditor, though defendant in the judgment, can obtain no lien under his attachment to defeat the assignee.

Where a judgment has been entered for the use of a party who disclaimed the assignment to him, the defendant may move the court to strike out the use, and upon proof of such disclaimer, the court may strike it out.

The general rule is, that a party to the record cannot be examined as a witness; but upon a motion to strike out the use to which a suit or judgment has been entered, the legal plaintiff may be examined to prove the consideration of the assignment. The contest is solely between the defendant and the *cestui que use*, and the witness is not liable for the costs of the motion.

Appeals from *Prince George's* county court.

The record in No. 8, showed, that on the 13th August 1841, *Thomas Baldwin*, for the use of *J. Owens*, sued out a writ of *ca. sa.* against *Robert Wright* and *Dewit Kent*, upon a judgment rendered in October 1838, for the sum of $360, and costs, returnable to the 2nd Monday in October 1841. The writ was returned *cepi.*, as to *R. W.*, who moved to quash it.

1st. Because the defendant had, subsequently to the rendition of the judgment above recited, recovered a judgment in the same court against *T. B.*, and sued out an attachment thereon, prior to the impetration of the said writ of *ca. sa.*, and laid it in the hands of the said *R. W.*, as will appear, &c.

The county court quashed the writ, and discharged the defendant. *T. B.* appealed to this court.

The record in No. 11, showed that on the 11th June 1840, *Robert Wright* sued out an attachment on a judgment rendered at April term 1840, against *Thomas Baldwin*. This writ not being returned, a second writ was issued on the 23rd November 1840, and returned, not attached; but was amended by the deputy sheriff, the high sheriff being dead, and returned, laid in the hands of *Robert Wright*, to amount of $355, and summoned, &c.

The defendant, *Thomas Baldwin*, moved to quash this attachment.

1st. Because the amended return is made in the name of a sheriff, and purports to be made by a sheriff who died before the amended return, or motion therefor, was made.

2nd. Because the writ of attachment was returned, not attached, to April term 1841, by the sheriff, and was renewed, by the order of the plaintiff, to the present term, who has thereby admitted the truth and validity of the said return.

3rd. The return is not made on the oath of any person authorized by law to return such process.

4th. The writ in this case, issued, when another writ of attachment, on the same judgment, was outstanding.

At April term 1843, *Robert Wright*, the garnishee, filed a short copy of the judgment, of October term 1838. *T. Baldwin* use of *J. Owens vs. R. W.* and *D. K.*, and motion to condemn that judgment under his attachment.

The county court overruled the motion of *Thomas Baldwin*, to quash the amended return to the writ of attachment. The garnishee then filed a deposition shewing, that *Joseph Owens*, the *c. q. use* of the judgment aforesaid, had declared to *R. W.*, that he, *Owens*, had no interest in the said judgment, and no knowledge of the said entry for his use.

At April term 1844, *Thomas Baldwin* offered to file a plea, that *R. W.* had no goods of his in his hands, to be condemned, &c., and prayed judgment accordingly.

On motion, the county court refused to receive this plea, and rendered judgment of condemnation of the goods, &c., of *T. B.*, in the hands of *R. W.* From this, *Thomas Baldwin* appealed.

The facts of No. 9 and No. 12 are sufficiently stated in the opinion of this court.

The record in No. 14 was an action of debt commenced by *Thomas Baldwin*, use of *J. Owens vs. Wright* and *Kent*, on the 23rd April 1836, returned *non sunt*, and renewed on the 13th May 1836, returned *cepi*, as to *R. W.* The defendants both appeared. The cause of action appeared to be assigned by endorsement of the 1st February 1836, to *J. Owens* by *Thomas Baldwin*, and the plaintiffs recovered judgment.

At April term 1843, the defendants, *W.* and *K.* moved the county court for a rule in *J. Owens*, to show cause why the use to which the cause had been entered should not be stricken out, which was granted to the following term. The rule was served on *J. Owens*, and upon showing cause, he offered to swear to this court, *Thomas Baldwin*, the legal plaintiff, to prove the consideration of the original assignment. The county court (KEY and C. DORSEY, A. J.,) refused to hear him, and the said *J. Owens* excepted.

The court then ordered the use to be stricken out, and the said *J. Owens* prosecuted this appeal.

These causes were all argued together as one cause, by consent, before ARCHER, C. J., DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

By J. JOHNSON for *T.* and *E. Baldwin* and *J. Owens*, and
By ALEXANDER for *Wright* and *Kent*.

ARCHER, C. J., delivered the opinion of this court.

It appears in this case, No. 8, that *Baldwin*, at October term 1838, recovered a judgment against *Wright* and *Dewit Kent*, for the sum of $360, with interest and costs. That on 13th July 1841, the plaintiff issued a *ca. sa.*, returnable to October term 1841, under which *Wright* was taken. That *Wright*, on the return of the writ, moved to quash the execution, on the ground that, subsequently, to the rendition of the judgment, he, *Wright*, had recovered a judgment, in the same court, against *Baldwin*, the plaintiff, to the execution, and had issued an attachment thereon, and laid the same in his own hands, prior to the issuing out of the *ca. sa.*, at the suit of *Baldwin* against him. On this motion, the *ca. sa.* was quashed by the court. The proceedings upon the attachment, do not appear in this record, but by an agreement of the parties, the facts in records No. 9, 11, 12 and 14, are to be considered as parts of this record, so far as they are applicable.

There is, as we apprehend, no evidence of the service or any valid attachment in the case of *Wright vs. Baldwin*, for reasons which we shall advance in a subsequent case. If this

be so, then the question would be, how far issuing of the attachment, by *Baldwin*, without any evidence of a levy of the attachment in the hands of *Wright*, could operate to induce the court to quash the *ca. sa.*

An actual attachment laid on the credits of *Baldwin* in *Wright's* hands, would, no doubt, be decisive upon this subject, and the pendency of such attachment, would furnish a good ground for quashing the *ca. sa.* The defendant may plead a pending attachment against the claim of a plaintiff, and upon the ground that such a plea would be available, as a defence, it ought to be received to quash the *ca. sa.*, the party issuing his *ca. sa.*, has his remedy on the judgment only suspended by its being quashed, for if the attachment should be ultimately defeated, he has it in his power to renew the *ca. sa.*; but if the court refuse to quash the *ca. sa.*, the defendant would be compelled to pay the money to the plaintiff, although he might be entitled to a condemnation of the credits in his hands. But, the fact that an attachment had been issued, to effect the credits of *Baldwin*, without any return of service, ought not to be attended with the same consequences. The court cannot know in whose hands the attachment will be laid, or whether, if it be levied, it will be levied so as to furnish *Wright*, against whom the *ca. sa.* issues, with any ground, whatever, for the interference of the court, in quashing the *ca. sa.* We, therefore, think the court were in error, in quashing the *ca. sa.*, and, therefore, reverse their judgment.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

The record in this case, No. 9, shows, that at April term 1840, *Wright* recovered a judgment against *Baldwin* for the sum of $505.92, interest and costs, and on the 23rd of November 1840, issued attachment thereon. By agreement of the parties, this attachment is to be considered as having been first returned, attached. But, at the succeeding term, the sheriff obtained leave to amend his return, and thereupon returned, that he had laid the writ in the hands of *Wright*, himself, and summoned him as garnishee.

The defendant moved to quash the writ of attachment, and the return thereto, for reasons which it will not be necessary to state.

The court overruled the motion to quash, and from this judgment an appeal has been taken. The record shows no final judgment to have been pronounced by the court from such a judgment, which is only interlocutory, no appeal will lie.

APPEAL DISMISSED.

An attachment in No. 11, was issued on the 11th of June 1840, returnable to October term 1840. This attachment was not returned, and at the same term, an alias attachment issued. These proceedings were taken out by *Wright*, on a judgment obtained by him against *Baldwin*, and professed to be grounded on the 7th sec. of the act of 1715, ch. 40, which authorises an attachment, instead of any other execution, to issue on a judgment. This process, under this act, is considered by the terms of the act, as an execution, and in our judgment, should be governed by the same principles. Assuming this principle to be true, the doctrines determined by this court, in *Turner* and *Walker*, 3 *G. & J.*, 385, are decisive against the right to take out an alias attachment before the first is returned. The second writ is grounded on the first, and the return thereof; and the first ought, therefore, to be returned before the second can legally issue. It cannot be assumed, from the neglect or failure of a sheriff, to return the first attachment, that there has been no service of it, and unless such fact was made to appear to the court, it would not be justified in issuing a second attachment. The first may have been served, and if, in such a case, a second attachment should be deemed lawful, there might be a double levy for the same debt, which would operate great oppression and injustice. From such a determination, no injury could result to a plaintiff. He possessed the power to rule the sheriff, to return the process, which might have been coerced by the court without delay, and if injury, in any manner, resulted from the conduct of the sheriff, the law furnished the plaintiff redress against him. This renders it unnecessary

to examine the question, how far it was competent for the deputy sheriff, after the death of sheriff, to return the second attachment, or to amend the return after it was made, for if the alias attachment was illegal, because there was no return to the first, an enquiry into the legality of these proceedings would be unimportant.

In this view of the subject, the court should have decided in favor of the motion to quash the attachment, and ought not, therefore, to have entered a judgment of condemnation.

JUDGMENT REVERSED.

In No. 12, *Thomas Baldwin* recovered judgment against *Robert Wright* and *Dewit Kent*, at October term of *Prince George's* county court, 1838. On the 16th April 1840, *Thomas Baldwin* conveyed to the appellants, among other property, the judgment he had thus obtained. On the 17th of April 1840, *Robert Wright* issued his attachment on a judgment he had theretofore obtained against *Thomas Baldwin*. The court decided, that *Wright* acquired a lien on the judgment of *Baldwin* against *Wright* and *Kent*, in virtue of his judgment against *Baldwin*, and the attachment by him issued on his judgment against *Baldwin*.

The date of the transfer to the appellants is prior, in point of time, to the attachment of *Wright*, so that it is clear the attachment could not give a prior equity to *Wright*.

But it is contended, that *Wright* could have set off his judgment against the judgment obtained by *Baldwin* against *Dewit Kent* and *Wright*. Supposing this judgment could have been set off, still, as the assignment bears date on the 16th April 1840, and the attachment issued by *Wright* was not issued until the day after, (the 17th of April 1840,) there can exist no foundation whatever for the claim set up by *Wright*.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

The evidence adduced by the defendant in No. 14, justified the court in the judgment they gave. The evidence of *Brooke* proves, that *Owens* disclaimed the assignment, and although

Baldwin proves, that the assignment was made to *Owens*, for a valuable consideration, if his testimony be admitted, that fact will not prevent the gratification of the defendant's motion, for as *Owens* disclaimed the assignment, he acquired no right in it.

We think the court erred in rejecting the testimony of *Baldwin*. The general rule is, that a party to the record cannot be examined as a witness. But, in this motion, to strike out the use, we do not consider *Baldwin*, as in any manner, a party. The contest is solely between the defendant, and the *cestui que use*, and he is in no manner liable for the costs.

JUDGMENT AFFIRMED.

ROBERT W. CARTER, ADM'R OF W. G. CARTER *vs.* W. H. TUCK, ADM'R OF SAMUEL FOWLER.—*December* 1845.

The plaintiff declared for sundry matters and things, properly chargeable in account, as per account filed, and for money paid, &c. At the trial of the cause, under the general issue, he abandoned his account. HELD: that under the money count, he might give evidence of money paid, not included in the account filed.

The account filed by a plaintiff, with a count in his declaration for sundry matters and things, properly chargeable in account, is not a bill of particulars, though it is an essential part of such count.

It is the office of a bill of particulars, to inform the defendant what is claimed under each count in the nar, be they many or few.

Under the 4th sec. of the act of 1835, ch. 201, in cases of contract, a verdict under one hundred dollars, will not sustain the jurisdiction of the county court.

APPEAL from *Prince George's* county court.

This was an action of *assumpsit*, commenced on the 28th April 1841, by *Samuel Fowler*, in his life time, against the appellant. The pleadings are sufficiently stated in the opinion of this court. The declaration claimed damages in the sum of $1000. The jury found a verdict for $63. The defendant moved for a judgment of *non pros.*, which the court overruled, and rendered judgment for the damages claimed, to be released on payment of the verdict, interest, and costs.

EXCEPTION. The plaintiff to maintain the issue on his part joined, having abandoned his account filed with the declaration, offered to prove, by one *William Watson*, that the plaintiff's intestate, in his life time, the said *Samuel Fowler*, and the said *William G. Carter*, agreed, that the said *Samuel* should pay to the witness the sum of fifty dollars, which, by agreement between the said *Carter*, in his life time, and the said witness, the said *William G. Carter* owed, and agreed to pay to the said witness; and that under an agreement, between the said *Fowler* and the said *W. G. C.*, and the witness, and at the instance and request of said *W. G. C.*, the said *S. F.*, in his life time, paid the said sum of fifty dollars to the said witness, some time in the year 1839.

The defendant objected to the said evidence going to the jury, as inadmissible, under the pleadings in the cause, and prayed the court to instruct the jury, that the plaintiff was not entitled to recover for any claim or sums of money, except those specified and included in his account, filed with his declaration, which instruction the court, (C. DORSEY, A. J.,) refused to give, and permitted the said evidence to go to the jury, as evidence under the issues joined on the count or counts; and were of opinion, and so instructed the jury, that the plaintiff, upon the money counts in his declaration, was entitled to recover for the said sum of fifty dollars, if they believed from the evidence aforesaid, that the said sum of fifty dollars was paid to the witness, by the said *Samuel Fowler*, as aforesaid, in the life time of the said defendant's intestate; to which opinion of the court, and their instruction to the jury, and their permitting the said evidence to go to the jury, the defendant excepted.

The defendant appealed to this court.

The cause was argued before ARCHER, C J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By T. F. BOWIE for the appellant, and
By W. H. TUCK for the appellee.

SPENCE, J., delivered the opinion of this court.

This was an action of *assumpsit* in *Prince George's* county court.

The declaration contained a count for sundry matters and articles properly chargeable in account—the common money counts; there was, also, an account filed with the declaration. The defendant pleaded *non assumpsit*.

The exception sets forth, that at the trial the plaintiff abandoned the account which he had filed with his declaration, and proved by a witness that the plaintiff's intestate, at the instance and at the request of the defendant's intestate, paid to the witness fifty dollars.

To which evidence the defendant, by his counsel, objected, as inadmissible under the pleadings in this cause, and prayed the court to instruct the jury, that the plaintiff was not entitled to recover any claim or sums of money, except those specified and included in his account filed with his declaration; which instruction the court refused to give, but were of opinion, and so decided, that it was evidence under the common counts.

Our first enquiry is, therefore, whether there was error in this judgment of the county court?

The counsel for the appellant insisted, that the account filed by the plaintiff in this case was, if not identical with, at least so far like a bill of particulars, as to serve the office, and have the same legal effect in pleading, as a bill of particulars. We think the account filed in this case is distinguishable from a bill of particulars. It is the office of a bill of particulars, to extend to, and inform the antagonist party, what is claimed under each count in the nar, be they many or few, whereas the account filed in this case forms an essential part of the first count in the nar, and without which it would be defective: it shews what the matters and articles properly chargeable in account, as set forth in this count, were; and does not, like a bill of particulars, profess to inform the defendant, with particularity, what is claimed under every count in the declaration; for these reasons the evidence was properly admitted under the common counts. We make this decision, after having fully considered the case so much relied on in the argument,

of *De Sobrey, Ex'r of De Laistree vs. De Laistree*, 2 *Har. & Johnson*, 191.

The question of jurisdiction raised in this case we consider settled by the decision in the case of *Beall and Black*, December term 1843, where this court say, "in cases of contract a different principle seems to have prevailed, and in all such cases, the sum recovered, and not the matter put in demand, is made to decide the question of jurisdiction."

From this rule no departure has been made by the act of 1835. "In all cases of debt or contract, expressed or implied, it is the real debt or damage which founds the jurisdiction."

By the 4th section of the act of 1835, it is provided, "that if any plaintiff brings such action in the county court, and the verdict of the jury is for a sum not exceeding the sum herein before limited and prescribed (namely, $100,) for the extent of the jurisdiction of the district court, in the several actions herein respectively specified, judgment shall, in such case he given for the defendant with costs." We are of the opinion, therefore, that the judgment of the court below is erroneous; that it should have been for the defendant with costs.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JOHN F. CHESLEY *vs.* GEO. W. TAYLOR.—*December* 1845.

C brought an action of debt against the maker of a single bill, payable to *B*, and declared upon it under the act of 1829, ch. 51, as assigned to him in writing. The defendant pleaded in bar. that it was not assigned in writing to the plaintiff, but endorsed in blank by the obligee; upon general demurrer the court rendered judgment for the plaintiff.

The assignee of a bond, or other chose in action, is unable to maintain an action on the instrument, in his own name, by the provisions of the act of 1829, unless there was an assignment of it in writing, signed by the party authorised to make the same.

A blank endorsement and delivery of the bill constituted the party to whom it was delivered, its absolute owner; and conferred upon the holder the power to fill up the blank, with a full assignment of the interest to himself.

When the blank is filled up, it becomes an assignment in writing by the party who endorsed it in blank; and though the assignment may not be completed until the time of trial, it is regarded, for the purposes of the suit, as having been made when the instrument was endorsed.

When the plaintiff declared upon a single bill as the assignee in writing thereof, and the defendant pleaded, that he was a minor at the period of the execution of the bill;—to which the plaintiff replied: ratification after full age;—on which replication the issue was made up; the defendant, at the trial, cannot ask an instruction to the jury, that the plaintiff is not entitled to recover, because the single bill was endorsed in blank at the time the suit was brought, and the assignment over the name of the obligee, only written at the bar, after the jury had been empanelled.

APPEAL from *Prince George's* county court.

This was an action of *debt*, commenced on the 9th September 1842, by the appellee against the appellant. The plaintiff declared upon the single bill of *John F. Chesley* and *W. G. Sanders, Jr.*, dated 5th August 1841, payable nine months after date, to *Eli S. Baldwin* or order, for $100, with interest, assigned by him to the plaintiff, by assignment in writing, for value received, and then delivered to the plaintiff. The oyer tendered with the declaration, showed the following endorsement on the single bill.

"For value received, I hereby assign and transfer the within single bill to *Geo. W. Taylor*, or order, and direct the contents thereof to be paid to him.

E. S. BALDWIN."

The defendant pleaded in bar:—

1st. That at the time of the institution of this suit, and the impetration of the writ original in this cause, the said single bill on which the said action is brought, was not assigned in writing to the said plaintiff by the obligee in said single bill, but was only endorsed by said obligee, *Eli S. Baldwin*, in blank, and this, &c.

2nd. That he was a minor at the time of the making of the said single bill.

The plaintiff demurred, generally, to the first plea, and the county court sustained the demurrer; and as to the second plea, he replied, that the defendant, after he came of full age, ratified and confirmed the original contract as his act and deed.

The defendant traversed the replication, on which issue was joined, and the jury found a verdict for the plaintiff on that issue.

At the trial of this cause, the plaintiff, to support the issue on his part joined, offered in evidence, to the jury, the single bill following:

"100 Dollars.—Nine months after date, we promise to pay *Eli S. Baldwin*, or order, the sum of one hundred dollars, for value received, with legal interest from date. Witness our hands and seals, this 5th day of August 1841.

JOHN F. CHESLEY, (Seal.)
W. G. SANDERS, JR., (Seal.)"

Endorsed.—"For value received, I hereby assign and transfer the within single bill to *George W. Taylor*, or order, and direct the contents to be paid to him.

E. S. BALDWIN."

And proved the same to be in the handwriting of the defendants, and the endorsement of *Eli S. Baldwin*, the obligee, to be in his handwriting.

The defendant, then, to maintain the issue on his part joined, offered in evidence, to the jury, that the single bill upon which the suit was brought in this cause, was not assigned in full, in writing, at the time of the institution of this suit; that the assignment in full, endorsed on the back of said single bill, was made at bar, and after the jury was empannelled; that at the time of the institution of the suit, and before that time, the said single bill had been endorsed in blank, only, in the handwriting of the obligee in said single bill, *Eli S. Baldwin*, and filed with the original nar.

Whereupon, the defendant prayed the court to instruct the jury, that the plaintiff, under the pleadings in the cause, and the said evidence, if believed by the jury, was not entitled to recover, because the said single bill was endorsed in blank at the time this suit was instituted, and the assignment over the name of the obligee was only written at bar, after the jury were empannelled, which said instruction the court, (STONE, C. J., and C. DORSEY, A. J.,) refused to give.

The defendant prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By C. C. MAGRUDER for the appellant, and
By T. F. BOWIE for the appellee.

MARTIN, J., delivered the opinion of this court.

In this case, an action of debt was instituted by the appellee, in his own name, against the appellant, on a single bill executed by the appellant and *William G. Saunders*, in these words:

"Nine months after date, we promise to pay *Eli S. Baldwin*, or order, the sum of one hundred dollars, for value received, as witness our hands and seals, this 5th day of August 1841."

The plaintiff, in his amended declaration, after reciting the bill, alleged, that *Eli S. Baldwin*, to whose order the single bill was payable, assigned the same to the plaintiff, by assignment in writing, for value received, and delivered the said single bill to the plaintiff, by reason whereof, and by force of the statute in such case provided, the defendant became liable to pay the plaintiff the sum mentioned in the bill.

To this declaration the defendant pleaded:

1st. That the plaintiff was not entitled to maintain his action, because at the time of the institution of the suit, the single bill was not assigned in writing to the plaintiff by the obligee in the bill, but was endorsed in blank; and

2nd. That the defendant was a minor at the period of the execution of the note.

The plaintiff demurred to the first plea, and on a joinder in demurrer, judgment was entered in his favor. To the second plea there was a replication, averring, that the contract was ratified by the defendant after he had attained the age of twenty-one years; upon which issue was joined.

At the trial before the jury, the plaintiff offered in evidence the bill obligatory, with the following endorsement:

"For value received, I hereby assign and transfer the within single bill to *George W. Taylor*, or order, and direct the contents to be paid to him."

(Signed,) "E. S. BALDWIN."

The defendant then offered in evidence to the jury, that the above assignment, as it appears in full, was not on the back of the note at the time of the institution of the suit, but was made at bar after the jury were empannelled; and that at the institution of the action, the single bill was endorsed only in blank, in the hand writing of the obligee, and filed with the original nar. The defendant then prayed the court to instruct the jury, that the plaintiff was not entitled to recover on the pleadings and evidence in the cause, because the single bill was endorsed in blank at the time the suit was brought, and the assignment over the name of the obligee was only written at bar after the jury had been empannelled. This instruction the court refused to give, and the defendant excepted.

It appears, from this statement of the case, that the question intended to be raised by the first of the defendant's pleas, and his prayer to the court, was, whether an assignment written by the plaintiff over the name of the obligee, *at bar*, and after the jury were empannelled, was such an assignment as gave to the plaintiff the right to institute an action, in his own name, on the single bill, under the provisions of the act of Assembly of 1829, ch. 51.

And although it is apparent, that this question could not be raised, under the pleadings in the cause, by the prayer of the defendant in his exception, yet, as it is properly presented by the plaintiff's demurrer to his first plea, we proceed to examine it.

The act provides, "that any assignee, *bona fide*, entitled to any judgment, bond, specialty or other chose in action, for the payment of money, by assignment in writing, signed by the person authorised to make the same, may, by virtue of such assignment, maintain an action, in any court of law or equity in this State, in his own name, against any obligor or obligors, debtor or debtors, therein named."

It is true, that the assignee of a bond or other chose in action, is unable to maintain an action on the instrument, in his own name, by the provisions of this statute, unless there was an assignment of it in writing, signed by the party authorised to make the same; but, it is perfectly clear, that the blank en-

dorsement and delivery of the bill, constituted the party to whom it was delivered, the absolute owner of the bill, and conferred upon the holder the power to fill up the blank, with a full assignment of the interest to himself. This is the appropriate object and office of a blank endorsement. When the blank is filled up, it becomes an assignment in writing, by the party who endorsed it in blank, and though the assignment may not be completed till the time of the trial, it is regarded for the purposes of the suit, as having been made when the instrument was endorsed. That is to say, it stands as if the bond or bill, instead of having been delivered with an endorsement in blank, had been delivered with an endorsement in full.

It is upon this ground, that the holder of a promissory note is allowed to fill up the blank endorsement, at the trial of the cause, and this is held as supporting the averment in his declaration, that the note in question, had been endorsed to him before the institution of the suit.

Mr. Chitty, in his *Treatise on Bills*, says, "a blank endorsement gives the holder, as well as any other person to whom it may be afterwards transferred, the power of instituting himself assignee of the beneficial interest in the bill, by filling it up payable to himself, which he may do at the time of trial." And in the case of *Hudson against Goodwin*, 6 *H. & J.*, 116, this court said: "But the endorsement on the note on which the suit was brought, appears to be in blank; and though the plaintiff may have filled it up at any time before verdict, yet not having done so, he is not entitled to recover."

This familiar and established doctrine is directly applicable to the question before us. The rights of the holder of a bond or single bill, delivered and endorsed in blank, are, in this respect, similar to those of the holder and endorsee of a promissory note, for he possesses, by force of the endorsement and delivery, the unquestionable power, by writing over the name of the assignee, to make a complete assignment.

It follows from the views thus expressed, that in our opinion, the county court committed no error, in having rendered their judgment on the demurrer in favor of the plaintiff.

For the same reason, we can discover no infirmity in the declaration, for it will be seen that the plaintiff has directly averred, that the assignment was in writing, and made by the obligee, as required by the statute.

We think, therefore, there was no error in the judgment of the county court, and that it must be affirmed.

JUDGMENT AFFIRMED.

JOHN CROSS, SURVIVING PARTNER OF ANDREW CROSS, ET AL., *vs.* M. I. COHEN, ET AL.—*December* 1845.

A deed of trust was made to secure to each stockholder in an unincorporated association, a theatre, the right of free admission, until the sum lent and advanced by them for each share, to the managers and proprietors of such theatre, should be fully paid; the right of free admission being in lieu of interest, without impairing the right to receive the full principal; and in further trust, to secure the payment of all claims against the managers, for work, and labor, and materials, performed or furnished, for the use of the theatre, and for which the claimant now has, or hereafter shall have, a written acknowledgment signed by the said managers, there being two of them, or by either of them, in their joint names. A sale of the theatre being decreed, HELD: that in the distribution of the proceeds, the stockholders had no priority over the material men.

Where it can be done without violating the plain and express terms of an instrument creating a trust, chancery will administer the fund which comes under its possession and control, under such trust, so as to give an equal portion to each creditor, which is considered but another mode of expressing its purpose, to do equal justice to all.

The order in which claims are mentioned and enumerated in a deed of trust, does not, *per se*, give any preference or priority of right.

There is no rule of equity which will afford relief to a party failing to comply with an express condition, except its performance be prevented by fraud, or fault of the adverse party, or by inability arising from unavoidable accident.

So where a claim, by the terms of a deed of trust, was required to be authenticated by a written acknowledgment, which the claimant "now has or hereafter shall have, signed by *W* and *B*, or by either of them, or in their joint names," the party, claimant, must comply with the condition.

But, although the written acknowledgment is not produced, a court of equity will entertain the enquiry, whether the condition has been in point of fact complied with.

Evidence that leaves no doubt of the fact, that at one time the claims were authenticated, as the deed required, yet that the certificates signed by *W* and *B*, were, at a subsequent period, surrendered, on an agreement to receive in lieu thereof, the certificate and promise of *W* alone, the claimants consenting to make no claim upon *B* personally, on the express condition, they should still hold their claim and lien under the mortgage to the trustees, shows, that the condition in the deed has been in fact complied with.

The parties were not required by the deed, to preserve the acknowledgment of their claims, and have it ready at all times to be produced with the claim.

The acceptance of the certificate of *W*, was no surrender of the claim under the trust. The property in the hands of the trustees, may be regarded as the primary and principal fund.

Where a creditor has a lien on a specific fund, an agreement to make no claim against one of two principals in a debt, on the express condition, that he shall retain the lien, will not defeat his remedy against the fund.

Where a bill was dismissed, not upon its merits, but under a rule further to proceed in the cause, it is not necessary to qualify the order of dismissal, by saying it shall be without prejudice to the rights of the complainants.

The act of 1832, ch. 302, sec. 5, provides, that no point relating to the competency of witnesses, or admissibility of evidence, shall be raised in the appellate court, unless it shall plainly appear by the record, that such point had been raised *by exceptions* filed in the cause in the chancery court.

The incompetency of a witness is not now noticed, unless objected to by exceptions.

It is an universal practice in chancery, that exceptions, like other formal papers, filed in a cause, must be signed by a solicitor of the court.

The return by an officer, before whom depositions are taken, by consent or by order of court, that objections were furnished to him to be filed, and filed in a cause, is not filing exceptions in the court of chancery, in compliance with the act of 1832, ch. 302.

The reservation of all legal exceptions usually inserted in an order of the court of chancery, permitting evidence to be taken in a cause, does not, since the act of 1832, ch. 302, authorise the Chancellor to make objections at the hearing, to the competency of a witness. That was formerly the practice of the court, but the act was passed to prevent it.

Appeal from the Court of Chancery.

The claim in this cause, arose under the following deed:

"This indenture, made the 11th October 1816, between *William Warren* and *William B. Wood*, managers of the new theatre, on, &c., of the one part, and *William Gwynn*, *Fielding Lucas, Jr.*, *John Frick*, *Jonathan Meredith*, and *George Hume Stewart*, all of, &c., trustees on behalf of the subscribers to the stock in the said theatre, of the other part. Whereas,

the several persons, whose names are contained in the list or schedule hereunto annexed, at the instance and request of the said *W. W.*, and *W. B. W.*, have heretofore subscribed for such and so many shares of stock in the *Baltimore Theatre* aforesaid, as are set opposite their respective names, and have advanced and paid to the said *W. W.*, and *W. B. W.*, the sum of $200 for each of the said shares of stock, to assist in erecting the said theatre on the three lots of ground on the east side of *Holliday* street, in the city of *Baltimore*, hereinafter particularly mentioned and described, on the express condition and promise of the said *W. W.*, and *W. B. W.*, that they would convey the said theatre, and the said three lots of ground on which the same is erected, to five persons, being stockholders as aforesaid. In trust, to secure to each and every of the said stockholders and his assigns, the right of free admission of one person for each share, to all performances which shall take place or be exhibited in the said theatre to a public audience, for pay or emolument, (except on such nights as the profits arising from the performance, shall be appropriated to the benefit of some actor or actors, who shall be under contract with the managers, to perform one whole season at least,) until the said sum of $200, so lent and advanced for each share respectively, should be fully paid to the said stockholders, severally, or their assigns; the right of free admission as aforesaid, to be deemed and considered as in lieu only of the interest on the said $200, without impairing the right to receive the full principal, and such right to each share of stock, to be assignable at the will of the stockholder, and the right of free admission to be transferable generally or for any special period, not less than one whole season. And further in trust, to secure the payment of all claims against the said managers, for work and labor, and materials, performed or furnished, for the use of the said theatre, and for which the claimant now has, or hereafter shall have, a written acknowledgment, signed by the said *W. W.*, and *W. B. W.*, or by either of them, in their joint names.

Now, therefore, this indenture witnesseth, that the said *W. W.*, and *W. B. W.*, for and in consideration of the above

recited premises, and for and in consideration, &c., have granted, &c., and by these presents do grant, &c., unto the said *William Gwynn, &c.*, the survivors or survivor of them, and the heirs and assigns of such survivor, all those three lots, &c. To have and to hold the said three lots, &c., above mentioned, and hereby granted, &c., unto them, the said *William Gwynn, &c.*, and the survivors or survivor of them, and to the heirs and assigns of such survivor, forever. In special trust and confidence, nevertheless, for the use, benefit and behoof of each and every of the subscribers to the stock in the said theatre mentioned, and their executors, administrators and assigns, respectively, to secure the said stockholders and their assigns, the right to free admission to all performances in the said theatre, (except as is herein before excepted,) with the full permission to transfer the use of such right for any one whole season or longer, as above specified, until the said *W. W.* and *W. B. W.*, their heirs, &c., or assigns, shall pay and satisfy the said respective stockholders or their assigns, the full sum of $200 for each share of stock subscribed, and acknowledged to be paid and advanced to the said *W. W.*, and *W. B. W.* And in further trust, to secure the payment of all claims for work, labor or materials for the said theatre, acknowledged and signed by the said *W. W.* and *W. B W.*, or either of them, as before mentioned; and it is hereby declared, to be the agreement, and true intent and meaning of the parties hereto, and of those interested in the said trust, that no claim shall be made by the said stockholders, or their assigns, for the payment of the sums of money advanced on the shares of stock to the said *W. W.*, and *W. B. W.*, nor by the said *W. W.* and *W. B. W.*, or their assigns, to destroy or put an end to the right of free admission, to which the owners of the said shares of stock are entitled, by repaying the amount of the money advanced to them as aforesaid, until the expiration of ten years after the date hereof; and that until default shall be made by the said *W. W.*, and *W. B. W.*, in the payment of any sum of money which can and shall be lawfully claimed and demanded of them, under the provisions of this deed, the said *W. W.*, and *W. B. W.*, and their heirs and assigns, shall and may have

the full and free use, occupation, control and enjoyment of the said theatre and lots of ground, with the appurtenances, subject only to the right of free admission of the said stockholders, and their assigns, as reserved in this indenture. And the said *William Gwynn, &c.*, for themselves, their heirs, executors and administrators, do hereby covenant, grant, promise and agree, to and with the said *W. W.*, and *W. B. W.*, their heirs and assigns, that on the payment of all sum and sums of money, due on account of the said shares of stock to the owners thereof, and also, all sum or sums of money that may be due and owing for work, labor or materials, in manner and form aforesaid, that then they, the said *William Gwynn, &c.*, and the survivor or survivors of them, or the heirs of such survivor, shall and will, on the reasonable request, and at the proper cost and charge in the law of them, the said *W. W.* and *W. B. W.*, their heirs or assigns, make, execute, acknowledge and deliver, or cause and procure to be made, executed, acknowledged and delivered, in due form of law, a good and sufficient deed or deeds, conveyance or conveyances, assurance or assurances, device or devices, in law, for the effectual conveying, releasing, and confirming unto them, the said *W. W.*, and *W. B. W.*, their heirs and assigns, forever, the said theatre, lots, &c., and that free and clear, and freely and clearly, acquitted, exonerated and discharged, of and from all, and all manner of claim of them, the said *William Gwynn, &c.*, their heirs, executors, administrators and assigns, or any other person or persons whatever, claiming or to claim, by form or under them, or any of them; or by or through their, or any of their means or procurement. In testimony whereof, &c."

A schedule of names, proprietors of one hundred and twenty-six shares, was appended to this deed.

On the 28th May 1839, a bill was filed by a number of the stock holders, against the trustees and managers, praying a sale of the theatre and lot on which it was erected, and after answers, a decree was passed for a sale.

On the 25th March 1842, *Sarah Brown* and others, administrators of *Stewart Brown*, filed their petition, alleging they had a large claim against the theatre, for materials furnished

by their intestate, for its erection and use, and being informed that a sale was delayed, by consent of parties, prayed that it might be peremptorily ordered to be made.

In 1843, *John Cross*, as surviving partner of *Andrew Cross* and *Stewart Brown*, of the firm of *A. & J. Cross & Company*, and the administrators of *Stewart Brown* and *Thomas Symington*, administrator of *William Stewart*, filed their petition, and after stating the previous proceedings in the cause, and the indenture of 1816, alleged, that they were claimants, whose claims were intended to be protected by the said deed of 1816, and the payment of which is secured, thereby, equally with the said stockholders, and that they are unable to obtain payment, except by a sale of the theatre. Prayer, for leave to take proof in support of their claim, and their right to demand a sale, &c.

In support of their claim, the petitioners, under the usual order of court, examined *Wm. Gwynn, Esq.*, one of the trustees in the deed of 1816, who proved, that the firm of *A. & J. Cross & Co.*, of which firm the late *Stewart Brown* was a member, did furnish lumber for the erection of the *Baltimore Theatre*, which was commenced in 1812; that he does not know what was the amount of their bill for the same, but that it was considerably more than $2000, and was so admitted by *Messrs. Warren* and *Wood*, the managers of said theatre, for whom deponent acted as agent. From a memorandum in deponent's possession, and herewith filed, marked exhibit O, the claim of *A. & J. Cross & Co.*, against said theatre, admitted by *Warren* and *Wood*, amounted, with interest on the 1st June 1815, to $2650. As agent of said *Warren* and *Wood*, deponent collected the subscriptions to the stock of said theatre, and paid the bills for them against the theatre.

That *William Stewart*, in his life time, furnished the stone work for the erection of said theatre, and that deponent, as agent of *Warren* and *Wood*, paid part of his claim against the theatre, and from said memorandum in his possession, (exhibit O,) the amount of his claim therefor, on the 1st June 1815, was $1051.28, without interest.

That he does not know the specific payments, but various payments were made by deponent on such claims, on the 1st May 1828; that deponent acting for *Wm. Warren*, had a settlement of the claim of *A. & J. Cross & Co.*, and there was found to be due upon the 1st November of that year, from said *Warren*, the sum of $1300, as appears from the promissory note of the said *Warren*, produced before deponent, and herewith filed, marked exhibit B; that the said promissory note is in deponent's handwriting, and was signed by *William Warren*, in deponent's presence, and on that occasion, the parties admitted the sum mentioned in said note to be the amount due.

That there was due upon the claim of *William Stewart* aforesaid, the sum of $850, on the first day of July 1826, as appears from the paper marked exhibit A, produced before deponent, and herewith filed; that said paper is in the body thereof, in the handwriting of deponent, and was signed by *William Warren*, in his own proper handwriting.

That at an early period, after the materials were furnished, by *A. & J. Cross & Co.*, and *William Stewart*, their claims were ascertained and acknowledged by *William Warren*, in the joint names of *Warren* and *Wood*, which certificates of acknowledgment were prepared by deponent, to certify the claims against said theatre.

That sometime about the year 1826, said *William B. Wood* sold out his interest in said theatre to *William Warren*, and it was made a condition of said purchase, as deponent knows from the parties, that said *Warren* should pay all the claims of persons holding such certificates against the theatre; and that he should get said claimants to accept the said *Warren's* individual liability and certificate, in lieu of the joint liability and certificate of *Warren* and *Wood*, that the only two claims then unpaid, which would come under the deed of trust, were the claims of said *A. & J. Cross & Co.*, and *William Stewart*, who agreed to accept the individual certificates of said *Warren*, upon the express condition, however, that they reserved their lien or claim under the deed of trust, which reservation and agreement is evidenced by a memorandum, appended to the claims of *A. & J. Cross & Co.*, marked exhibit C, and which

properly and truly represents the understanding and agreement of said claimants, and *Warren* and *Wood*, on the former receiving the individual certificates of *William Warren;* that upon receiving the individual certificates of *William Warren*, the joint certificates of *William Warren* and *Wood*, were delivered up.

That in regard to exhibit C, the handwriting of which, and of the initials thereto, deponent does not know.

That he is well acquainted with the handwriting of *William Warren* and *William B. Wood*, and that he has recently examined their answers in the chancery office, referred to in the interrogatory, and the signatures to said answers are in the handwriting of said *Warren* and *Wood*, respectively; and that the paper now produced to him, and mentioned in said interrogatory, as papers marked No. 1, was in his hand at the time he examined said answers, and is in deponent's opinion and belief, a true copy thereof.

On the 2nd December 1843, *William Gwynn, Esq.*, being cross-examined, on the part of *Mendez I. Cohen*, one of the stockholders in said theatre, upon certain interrogatories herewith filed, the said *Gwynn* further deposed and said as follows:

That the claims of *Cross & Co.*, and *Stewart*, were against *Warren* and *Wood*, as managers of the theatre, and are among the claims referred to in the deed of trust, from *Warren* and *Wood* to five trustees, of whom deponent was one; deponent has no knowledge of any legal steps having been taken, for the collection of said claims of *Warren* and *Wood*, otherwise than by proceedings in chancery, to sell the theatre property, which said *Warren* and *Wood* had mortgaged to five trustees, of which deponent was one. A bill was filed by *Cross & Co.*, and *Stewart*, praying such sale; no legal steps were taken against *Warren* and *Wood*, individually, for the collection of said claims.

That the theatre, if sold, would not produce within $5000 of the amount due the stockholders; deponent cannot tell the number of stockholders.

The exhibit O, referred to by the witness, contained a list of claims against the theatre. The note of *William Warren*, for $1300, dated 1st May 1828, payable six months after date, to *W. Gwynn*, as trustee, for value received, in materials for the said theatre, when first built; endorsed; *William Gwynn*, trustee.

Exhibit C. "I have received from *William Warren*, in lieu of this, from *Warren* and *Wood*, thereby consenting to make no claim on *William Wood* personally, for my account against the *Baltimore Theatre*, but on the express condition, that I still hold my claim and lien on the theatre and lot, under the mortgage to the trustees, as well as on said *William Warren*.

15*th August* 1826. S. B."

Exhibit A, was the acknowledgment of *William Warren*, of 1st July 1826, of balance due to *William Stewart*, $850, for work and labor, and materials for the *Baltimore Theatre*, payable with interest, the payment, whereof, is secured by a mortgage of the said theatre to *W. G.* and others, in trust.

The objection raised in the Court of chancery to this deposition and exhibits, is particularly set forth in the opinion of this court.

The petition of the appellants was also answered by *Warren* and *Wood*, who admitted their claims, their origin and existence, and disclaimed all present interest in the theatre.

The Chancellor, (Bland,) on the 15th January 1844, decreed as follows:

"Although it appears from the proofs, that the petitioners were at one time creditors, whose claims against the said managers was for work and labor, or materials, performed or furnished on the said theatre, yet, as they have now here produced no written acknowledgment thereof, signed by the said *William Warren* and *William B. Wood*, or by either of them, in their joint names, according to the terms of the said indenture, of the 11th October 1816, under which, alone, the said petitioners can have any standing here, in this suit, as creditors. It is therefore ordered, that the said petitions be dismissed, with costs."

From this decree, the petitioners appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By BROWN and BRUNE for the appellants, who contended:

1. Their claims being respectively for materials furnished for the theatre, and used in its erection, and having been, soon after such materials were furnished, acknowledged by a writing, signed by *William Warren*, in the joint names of himself and partner, *William B. Wood*, were embraced within the terms of the deed of trust, of the 11th of October 1816, and secured by its provisions, equally with the stockholders therein mentioned.

2. The subsequent surrender of these acknowledgments, and the substitution therefor of the acknowledgments signed by *William Warren*, in his individual name, under the agreement proved by *Mr. Gwynn*, did not release the rights of appellants, previously acquired, to participate in the security afforded by the deed of trust, nor impair the liens, which they then held to the property conveyed by said deed.

They cited: 2 *Sto. Eq.*, 521. 4 *Mad.*, 161. 1 *Collyer*, 409. *Clagett, et al., vs. Salmon*, 5 *G. & J.*, 351. *Duffy vs. Orr*, 1 *Clark & Fin.*, 253. *Kirby vs. Taylor*, 6 *John. C. R.*, 242. *Powell on Devises, Ch.* 35, 665. 22 *Law Lib.*, 355. *Catskill Bank vs. Messenger*, 9 *Cow.*, 37.

By GLENN for the appellees, who contended:

1st. That the petitioners, appellants, are not creditors coming within the terms of the deed of trust.

2nd. That they are to be postponed to the other creditors of the theatre.

3rd. That *W. Gwynn, Esq.*, is not a competent witness in the case.

4th. That the petitioners have discharged all claims against the fund, by a release of *Mr. Wood.*

5th. That the debt of petitioners, from lapse of time, is presumed to be paid.

On the 1st point he cited: *Pierpoint and Lord vs. Graham*, 4 *Was. C. C. Rep.*, 232. *Cheever, et al., vs. Clarke*, 7 *S.*

& R., 510. *Kirby vs. Taylor*, 6 *John. C. R.*, 242. *Shaw vs. Pratt*, 22 *Pick.*, 308, is against all the authorities.

On the 3rd point he cited: *Supervisors of Chenango vs. Birdsall*, 4 *Wend.*, 457. 10 *Wheat.*, 384, 385. *Greenleaf on Evid.*, 199, 398. *Hougham vs. Sandys*, 2 *Sim. & Stuart*, 221. 1 *Con. Eng. C. Rep.*, 427. *Fereday vs. Wightwick*, 4 *Russ. C. R.*, 114, 115. *Act of* 1832, *ch.* 302.

On the 4th point he cited: *Co. Litt.*, 212. *Esp. N. P.*, 281. *Steinman vs. Magnus*, 11 *East.*, 390.

CHAMBERS, J., delivered the opinion of this court.

The legal construction of the deed of trust, dated 11th October 1816, is one of the material points on which this cause must be decided, and many authorities have been cited to sustain the different views taken by the respective counsel. After a full consideration of these authorities, we have arrived at the conclusion, that the priority claimed by the appellees for the stock holders cannot be sustained.

It cannot, certainly, be successfully contended, that the origin and nature of their debt gave them stronger claims, in equity, upon the trust fund. The labor and materials furnished by the appellants, contributed to enhance the value of the trust property, which had been purchased with the funds advanced by the stockholders. The improvement of the city, and a desire to introduce theatrical amusements, doubtless operated, in some degree, as inducements for the subscriptions and advances of stockholders, who could not fail to consider the enterprize as one of some hazard. The appellants furnished their materials and labor in the ordinary routine of their respective business operations, and must be presumed to have had at least an equal claim, and it would seem, an equal expectation of payment.

Where it can be done without violating the plain and express terms of the instrument creating the trust, chancery will administer a trust fund which comes into its possession and control, so as to give an equal proportion to each creditor, which is considered but another mode of expressing its purpose to "do equal justice to all."

There are no such provisions in this deed as to require a departure from this rule.

The trusts of the deed are "to secure the stockholders the right of free admission to performances," "until *Warren* and *Wood* shall pay the stockholders, or their assigns, the full sum of two hundred dollars for each share subscribed;" "and in further trust, to secure the payment of all claims for labor or materials," &c.

Now it is remarkable, that there is not any where in the deed an express stipulation, to pay the two hundred dollars per share.

It is covenanted, that the stock holders shall not exact payment until the expiration of ten years, and that *Warren* and *Wood* shall not be permitted, for that period, to repay the advances of two hundred dollars per share, and thus terminate the right to free admission; and there are covenants securing the possession to *Warren* and *Wood* during those ten years, and binding the grantees to reconvey on payment of the money intended to be secured. All parts of the deed indicate the intention to secure the repayment of these advances, but there is no express covenant to pay. This omission seems to be scarcely consistent with the allegation, that the leading object of the deed was to secure a preference for these advances over claims for labor and materials.

It is true, this preference might be made without such express stipulation to pay, but certainly the absence of it is not calculated to impress the belief, that the preferred payment was very distinctly before the mind of those who prepared and executed the deed.

Reliance was placed on the circumstance, that the claims of the stockholders are first mentioned in the declaration of trust, and that the claims for labor and materials are provided for as "a further trust."

It was well answered, that where more than one claim or claims were provided for, it was necessary to mention them successively, and that the order of enumeration does not give preference. There seems to be no more evidence of intended priority by connecting the two classes, as here, by the words, "in further trust," than by more brief terms of conjunction. In trust to "pay A his debt, and B his debt"—"in trust to

pay A his debt, and in further trust to pay B his debt"—or "to pay A his debt, and also B his debt," are but different modes of expressing the trust to be for the payment of the two debts of A and B; and neither will, alone, entitle A to receive his claim to the exclusion of B, if the fund be insufficient to pay both.

It is objected, however, that the condition upon which, alone, the claims of the appellants were to be paid, has not been complied with, by producing the certificate of *Warren* and *Wood*, or of one, in their joint names.

There is no rule of equity which will afford relief to such a party failing to comply with an express condition, except its performance be prevented by fraud or fault of the adverse party, or by inability arising from unavoidable accident.

This doctrine is ably discussed in the case of *Bath and Montague*, 3 *Cases in Chancery*, 55, and is sustained by the authorities cited at bar.

But the matter for consideration here, is whether the condition has been, in point of fact, complied with; and this, it is said, is proved by the evidence of *William Gwynn*.

His competency, as a witness, therefore, was a point much debated. It is unnecessary to say what would have been the opinion of the court, if exceptions had been taken in the Chancery court, according to the directions of the act of 1832, ch. 302.

That act provides, that no point relating to the competency of witnesses, or the admissibility of evidence, shall be raised in this court, unless it shall plainly appear, by the record, that such point had been raised by exceptions filed in the cause in the Chancery court. It is, therefore, quite unimportant that objections can be stated, which, if properly urged, would show the witness incompetent, inasmuch as this court cannot consider or notice the point, unless the act has been pursued.

The material enquiry then, is, have exceptions been filed in this cause, in the Chancery court?

In relation to the alleged exceptions, we learn from the record, in the return of the justice of the peace before whom the testimony was taken, that he, the justice of the peace,

"returned, with the deposition, certain suggestions and protest, left with him by *Nathaniel Williams, Esq.*, to be filed in his own behalf, and in behalf of other trustees therein named."

In another part of the record, is a paper in the following words: "*Cohen* and others, vs. *Gwynn* and others. In Chancery. Under the order of court for the taking of testimony, the majority of the trustees make, before the justice, to be annexed to his return, the following suggestion and protest:

1st. They protest against all evidence to support any claim or claims which is or are unaccompanied by a written acknowledgement signed by *William Warren* and *William B. Wood*, or by one of them, in their joint names.

2nd. They protest against any evidence, unless it is adduced to prove the claim of the petitioners, and that they are creditors secured by the deed of trust.

3rd. They protest against the evidence of *William Gwynn, Esq.*, as reserved by the Chancellor.

Baltimore, 27th November 1843."

By whom filed, or when, we only know by the information in the return of the justice. This is the paper, and the only one, which is claimed as the "exceptions filed in the Court of chancery."

Without stopping to ascertain, whether the language of this paper does really import an objection to the "competency of *William Gwynn*, as a witness, or to the admissibility of his evidence," or whether professing, as it does in the justice's return, to be intended for a case in which *Mr. Williams*, with others, was a trustee, it could apply to this case, in which *Mr. Williams* does not appear before the court in the character of a trustee, he having been a trustee only for the term of ten years, ending in 1836, as is expressly alleged in the bill, and stated in the joint answer of himself and others; the necessary enquiry is forced upon the court, whether it be such an "exception" as the act of 1832 contemplates? It is an universal rule of practice in chancery, that exceptions like other formal papers filed in the cause, must be signed by a solicitor of the court. If a bill is not thus signed, it may, in any stage of the cause, be taken off the files of the court. 2 *Mad. Ch.*, 167.

So of an answer. *Ib.*, 331. A plea must in like manner be signed. *Ib.*, 295. And so must an exception. *Ib.*, 346. The qualification made by the second rule of the Chancery court, does not affect this case.

This practice is as proper, as it is universal. Without it, every individual in the cause, whether complainant or defendant, might file in the court papers of any and every character, which caprice, prejudice, passion or malignity might suggest, and without responsibility; whereas, a solicitor who should violate the decorum or dignity of the court, could be dealt with summarily, according to the nature and magnitude of his breach of professional duty.

This paper is not only not signed by a solicitor in the cause, but it is not signed by any one.

Nor was it "filed in the Court of chancery," within the meaning of the act. Its object was to prevent surprise, by raising points here in relation to testimony not raised in the court below. It may very well occur, that in the haste of executing a commission, or an order to take testimony, objections to portions of it may be taken, which afterwards, on consideration, will be abandoned; or, as is frequently the case, evidence is taken without objection, which afterwards is considered inadmissible, thus showing that the taking, or omitting to take objection before the commissioner, is not a sure guide by which to know the points in relation to it, raised in the court below. This case illustrates this position:

The decree says, "it appears from the proofs, that the petitioners, the present appellants, were at one time creditors," &c., whereby, it appears, the Chancellor did act upon the testimony of *Gwynn*, as there was no other such proof in the cause.

In this way, objections suggested at the execution of the commission, and afterwards practically abandoned at the hearing, might be again relied upon in this court, in obvious violation of the design of the law.

The return by an officer, before whom depositions are taken, by consent or by order of court, that objections were furnished to him to be filed in the cause, is not "filing exceptions in the

court of chancery, in compliance with the act of 1832, ch. 302."

It has been urged that here, by the terms of the order, "all legal exceptions" are expressly reserved. This is not tenable ground.

The order, with this reservation, is passed *ex parte*, and as matter of course, on a proper application; and according to the *English* practice, and the former practice in *Maryland*, all objections were open at the hearing, and then was the proper time for making them, the exceptions being reserved, to be then considered. 2 *Ves. & Bea.*, 401, *Murray and Shadwell.*

If the order was absolute, to allow the defendant to be a witness, it might conclude the adverse party, but with the reservation, the evidence of a defendant thus taken, came before the court subject to all objections at the hearing below, or if not urged there, the objections might be stated in this court after appeal, as is now claimed. But this is exactly what the act of 1832, intended to prevent, by denying to this court the authority to notice any such objection, unless the record makes it appear, that "exceptions" were filed, not before the commissioner, but "in the Court of chancery."

In 10 *G. & J.*, 414, *Jones and Hardesty*, one witness had been examined, without any notice to the adverse party, and another witness was a defendant in the cause, who had been examined under the commission, without any previous order; yet the court was prohibited from noticing these objections, which, but for the act of 1832, would have been conclusive.

William Gwynn's testimony, then, being in the case, does it prove a compliance with the terms of the deed? It leaves no doubt of the fact, that at one time, the claims of the appellant were authenticated, as the deed required; but the certificates signed by *Warren & Wood*, were, at a subsequent period, surrendered on an agreement, to receive in lieu thereof the certificate and promise of *Warren* alone, the claimants "consenting to make no claim on *Wm. Wood*, personally, but on the express condition, they should still hold their claim and lien, under the mortgage to the trustees." Now it has been conceded, that a strict compliance with such a condition, must

be proved by a party claiming under it. There is, however, no rule which authorises a court of equity, to add other or more rigid restrictions than those contained in the contract.

As in all other cases, the object and intent of the parties, as expressed in the instrument, should be ascertained, and such an interpretation given to the whole and each part as will best effect that intention.

The condition was apparently introduced to protect others having an interest in the integrity of the fund, against claims not properly chargeable against it. As *Warren & Wood* being partners, had authority, each, to use the names of both, it may be difficult to discover how that protection was increased, by requiring either to subscribe "in the name of both," rather than for himself alone. It is sufficient, however, that it does plainly and clearly so require, and when the claim was authenticated by the required signature, the claimant had an immediate and positive right, as a *cestui que trust* under the deed.

If afterwards the acknowledgment had been destroyed by accident, would it destroy the pre-existing right? If even lost by the claimant's negligence, could that fact put an end to such right? Certainly not, while it was admitted, either that he had before the deed, or afterwards, procured the acknowledgment as required.

It is not said the acknowledgment must be preserved, and be at all times ready to be produced with the claim; there is nothing in the object or meaning of the parties that requires an interpretation, such as these additional terms would give to their contract; and therefore, it is not requisite to prove any such additional fact.

It only remains then to be seen, whether the appellants have surrendered their rights, under the deed, by the surrender of the certificates of *Warren and Wood*, and by receiving the individual notes of *Warren*, with the express condition, that they should not thereby lose their claim and lien under the deed. None of the cases referred to on this branch of the case, are precisely similar in principle to this.

The debt was here due, originally, from *Warren and Wood*. They executed the deed of trust to the appellees, as trustees

for their creditors, of the very property, for the improvement and increased value of which, they became debtors to the appellants, and which, it appears by the recital in the deed, was at the commencement of the enterprise agreed to be conveyed to the trustees for the purposes mentioned. The property thereby, became legally and equitably bound for the payment of these claims, and the trustees could be compelled so to apply it. They had voluntarily assumed the liability, in respect to this property which had previously attached to *Warren* and *Wood*. When the joint notes, or acknowledgment of *Warren* and *Wood* were passed to the appellants, does not appear; nor is it, perhaps, at all important.

In fact, the original agreement, as recited in the deed, would seem to indicate, that the property in the hand of the trustees was to be regarded as the primary and principal fund.

It is said to have been pledged as the consideration for the subscriptions, and, of course, before the claims of the appellants arose; and the deed was the execution of that pledge. The acknowledgments were not required to be in terms which should make *Warren* and *Wood* personally liable, it was to be an evidence of debt against the trustees; against the fund. In this view of the case, the trustees representing the fund might well be considered as principals.

But it is not necessary to put the case on that ground. The authorities referred to, are sufficient to sustain the proposition, that where a creditor has a lien on a specific fund, an agreement "to make no claim" against one of two principals in the debt, "on the express condition, that he shall retain the lien, will not defeat his remedy against the fund."

There has been no such long continued silence, or laches, as to amount to presumptive payment. The facts in the case account for the delay; and show repeated efforts to enforce the claim.

The only other ground on which the appellees claim that the remedy has been lost, to wit, the order dismissing the bill filed by the appellees, cannot be sustained.

The bill was dismissed, not upon its merits, but under a rule further to proceed in the cause, and in such cases it is not ne-

cessary to qualify the order by saying, that it shall be without prejudice to the rights of complainants. *See Sto. Eq. Pl.* 611. *See* 793. 1 *Barbour's Ch. Pr.* 246. 2 *Ib.*, 200.

The court will sign a decree reversing the decree of the Chancellor and remanding the cause, to be proceeded on in the Chancery court according to the principles herein declared.

DECREE REVERSED AND CAUSE REMANDED.

COLMORE BEANES *vs.* SAMUEL HAMILTON.—*December* 1845.

The plea of limitations, to a *scire facias* to revive a judgment, ought to state the time when the judgment was rendered, otherwise it is defective on special demurrer.

APPEAL from *Prince George's* county court.

On the 3rd October 1842, *Samuel Hamilton* sued out a writ of *scire facias*, to revive a judgment recovered by him against the appellant, at April term 1828. The defendant appeared, and after oyer of the writ, pleaded *nul tiel* record, and limitations, in which latter plea it was alleged, "that the judgment, aforesaid, in the writ of *scire facias*, aforesaid mentioned, was had and recovered against him, the said defendant, on the — day of ——, and not after;" and "that," &c.

The plaintiff replied there was such a record, and demurred specially to the second plea, on which issues in law were joined. The county court, on production of the record, found the first issue for for the plaintiff, and also sustained the demurrer, and rendered judgment of *fiat*.

The defendant appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By C C. MAGRUDER for the appellant, and
By W. H. TUCK and J. JOHNSON for the appellee.

DORSEY, J., delivered the opinion of this court.

The ground of the special demurrer, filed in this case to the appellants plea of limitations, is, that blanks were left in the plea, in its allegation of the time when the judgment was rendered, on which the *scire facias*, in the case before us, had issued. The allegation, in which the blanks are left, forms a customary part of such a plea, and cannot be regarded as a wholly immaterial part of it. It is repugnant to nothing which precedes or succeeds it; and is an appropriate allegation in connection with the judgment to which it relates. The omission to fill up the blanks in question, we therefore think, formed a fit subject for a special demurrer.

JUDGMENT AFFIRMED.

T. T. SOMERVELL *vs.* S. H. SOMERVELL.—*December* 1845.

An executor who had paid specific legatees, discovering a deficiency of assets to pay creditors, and a consequent overpayment to legatees, cannot maintain an action at law to recover back such overpayment from a particular legatee. A court of law cannot take into consideration, as a court of equity would do, the mode in which the funds might have been applied.

APPEAL from *Calvert* county court.

This was an action of *assumpsit* brought by the appellant against the appellee, and the whole cause is sufficiently stated in the opinion of this court. The plaintiff below appealed.

The cause was argued before ARCHER, C. J., SPENCE, MAGRUDER and MARTIN, J.

By BOYLE, D. A. G., for the appellant, and
By RANDALL and N. BREWER for the appellee.

SPENCE, J., delivered the opinion of this court.

Action of *assumpsit* in *Calvert* county court. The declaration contained, a count for work and labor; the common money counts; a count on an account stated; and a special

count, which charged, that the plaintiff, as executor of *John Somervell*, had paid over to the defendant, as one of the specific legatees of his testator, her specific legacy, valued at $293.20. That as such executor he had overpaid the estate, by reason whereof the defendant became liable to contribute and pay the plaintiff $59.31, so overpaid.

To this declaration the defendant pleaded *non assumpsit*, and the statute of limitations.

The plaintiff, at the trial, offered in evidence the will of his testator; the inventories; his second administration account, shewing an overpayment of $1991.91; and various receipts from the specific legatees, and among them, the defendant's, and there rested his case.

"The defendant, by her counsel, prayed the court to instruct the jury, that from the declaration and pleading, and evidence in the cause, the plaintiff cannot recover: 1st. Because this court has not full jurisdiction over the subject matter thereof. 2nd. Because the remedy of the plaintiff, (if any he have,) is in a court of equity, where alone, all the parties can be brought before the court, and full justice done to all interested, by a final decree, in the premises; of which opinion was the court, and so instructed the jury."

The only question presented in this case for our revision, and the only one which we intend to decide, is, whether the county court, as a court of law, had jurisdiction?

This was an action at law, to recover back a part of a specific legacy, which, as executor, the plaintiff had, by reason of a deficiency of assets to pay in full creditors and legatees, overpaid to the defendant.

In the case of *Johnson vs. Johnson*, 3 *Bos. & Pul.*, 169, *Lord Alvanley, Ch. J.*, says, "if an executor, thinking he he has settled the affairs of his testator, pay the legacies, I have no difficulty in saying, that a court of common law would not entertain an action for money had and received, against a legatee, since such a court cannot take into consideration, as a court of equity would do, the mode in which the funds might have been applied." In *Doe on demise of Lord Saye and Sele vs. Guy*, 3 *East. R.*, 123, *Lord Ellenborough, Ch. J.*,

said: "But it never could be doubted, but that at law the interest in any specific thing bequeathed, vests in the legatee upon the assent of the executor. If it should afterwards appear that there is a deficiency of assets to pay creditors, the court of chancery will interfere, and make the legatee refund, in the proportion required."

Mr. Justice Story in his *Commentary on Equity*, *page* 507, *sec.* 534, in commenting on the jurisdiction of courts of equity, in cases of administration and settlement of estates, uses this language: "But the fact of its being a constructive trust, is not the sole ground of jurisdiction. Other auxiliary grounds also exist; such as the necessity of taking accounts, and compelling a discovery; and the consideration, that the remedy at law, when it exists, is not plain, adequate, and complete."

We think, therefore, both upon principle and authority, there was no error in the judgment of the county court.

JUDGMENT AFFIRMED.

JOSEPH ISAAC *vs.* RUTH WILLIAMS.—*December* 1845.

In an action of replevin for negroes, upon the plea of property in the plaintiff, it appeared, in the proof of the plaintiff, that the defendant had paid him the sum of twenty-five cents for hire, on several occasions, for one of the negroes, and declared she would do so as long as the plaintiff would suffer her to keep possession, and admitted she had received clothing from the plaintiff, for the children, which he had purchased, in her presence, for them; that the defendant had enquired of the plaintiff, whether he would agree to sell the negroes, and the plaintiff refused to sell them. The plaintiff also offered proof of an agreement between him and the defendant, that the plaintiff was to clothe the children, and the defendant to pay hire for them, until the plaintiff thought proper to take the mother and children home. The defendant proved, that the slaves were born in her possession, and so continued up to the institution of this action; that the plaintiff married her daughter; that when he demanded possession of the negroes, before he brought his action, he refused to state how he claimed them; the defendant stated to the plaintiff how she had given them to her daughter, conditionally, to which he made no reply.

HELD, there were facts in the proof from which the jury might infer, that the plaintiff had acquired title to the negroes, otherwise than by gift; that if the jury found his claim to be in pursuance of a gift from his mother-in-law, an express delivery and transfer of the use and possession was indispensable under the act of 1763, ch. 13.

If the plaintiff's title did not flow from a gift, then evidence of a witness who saw the delivery, was not necessary; the delivery, like other facts, may be proved by inferential testimony,

In a controversy between two parties, one claiming certain negroes as purchased from the other, the proof on one side consisting of facts from which a sale might be inferred—the other resisting the claim, as owner, who only designed to make a conditional gift,—the admissions of the latter, from which a sale might be inferred, will not estop her from showing the true nature and character of her right.

Where the whole proof in a cause was oral, and the jury, in its consideration, might infer title either in the plaintiff or defendant, as they should happen to make inferences from the proof, it is error in the county court to consider the proof as establishing only one view of the cause, and instruct the jury, absolutely, upon that hypothesis. Such a course decides the matter in controversy, which could alone, from the evidence, be determined by the jury.

APPEAL from *Prince George's* county court.

This was an action of *replevin* instituted on the 23rd March 1841, by the appellant against the appellee, for a negro woman named *Harriet*, and her four children, *Washington*, *Mary*, *Joseph* and *John*.

The defendant pleaded *non cepit*, and property in herself, and property in another, and not in the plaintiff. The plaintiff joined issue on the first plea and replied property in himself, on which issue was also joined.

The jury found a verdict for the defendant on all the issues.

At the trial of this cause, the plaintiff, to maintain the issues on his part joined, proved, that in 1835, the witness being at the house of the plaintiff, the defendant came there, and in the presence of the witness, paid to the plaintiff twenty-five cents, for one year's hire of negro *Harriet*, one of the negroes replevied in this case, and at the same time called on this witness to notice the payment of said hire. That this witness asked the defendant, if she paid the plaintiff hire for said negro *Harriet*? When the defendant said, that she had always paid hire for said negro, and that she would continue to do so as long as the

plaintiff would suffer her to keep possession of said negro, or so long as she, the said defendant, thought proper to hire said negro. The plaintiff further proved, by the same witness, that in 1841, he, at the request of the plaintiff, went with him to the house of the defendant to demand the delivery of the negroes sued for in this case; and that on that occasion the defendant said, that she had paid hire in the presence of *Richard Isaac*, *Anne Isaac*, *W. W. Hall*, and this witness; and that the defendant, at the same time, stated, that she had received, from the plaintiff, clothing for the children of *Harriet*, the other negroes mentioned in this suit. This witness further proved, that when, in 1841, the plaintiff demanded said negroes of the defendant, she said, that she had never designed the children of *Harriet* for the plaintiff; that she wanted said negroes to pay her debts, and that after her debts were paid, and after her death, they could be divided amongst her heirs at law: when the plaintiff said, that he could dispose of his own servants. The plaintiff further proved, by another witness, that in the winter after the death of *Mrs. Isaac*, the wife of the plaintiff, and one of the daughters of the defendant, who died in the fall of 1834, she was in the house of the plaintiff, when the defendant being present, asked the plaintiff if he would agree to sell negro *Harriet*, and her children, the negroes mentioned in this suit; that *Harriet* had selected a *Mr. Hyatt* for her master, if the plaintiff would agree to sell them; that the plaintiff asked the defendant, if she did not recollect a promise he had made his wife, the daughter of the defendant, on her death bed? that the defendant said yes, but that promises to dead people were nothing; that the plaintiff said they were something to him, and that he would not sell them, but that he would take said negroes home; that the defendant then said that negro *Harriet* would not be satisfied at the plaintiff's, that his rules were too severe for her; that the defendant then asked the plaintiff to permit her to keep possession of said negroes as long as she lived, or until the plaintiff wanted them, that she, the said defendant, would take good care of said *Harriet*, and her children, for the plaintiff's daughters. The plaintiff further proved, by this witness, that the promise referred to, as having been

made by the plaintiff to his wife on her death bed, was, that he, the plaintiff, would give said negroes to his daughters. He further proved, by this witness, that at the time the defendant asked the plaintiff if he would sell said negroes, the defendant stated, as the reason why she desired the plaintiff to sell them, that the money put at interest would be better for the plaintiff's children. He further proved, by this witness, that in frequent conversations, held with the defendant, she always heard the defendant call the negroes, *Polly's* negroes, that is, the negroes of the plaintiff's wife. The plaintiff, further to maintain the issues on his part joined, proved, by another witness, that in 1838, 1839, or in 1840, the witness being a merchant, the plaintiff and defendant were present at his store when the defendant said to the plaintiff, that it was time those children had their summer clothes; that the plaintiff then told the witness to cut off the clothing, which he did; this clothing was paid for by the plaintiff. The plaintiff further proved, by another witness, that in 1836, he was present at the plaintiff's house when he saw the defendant pay the plaintiff twenty-five cents, which she said was the hire for negro *Harriet*, for that year; that *W. W. Hall* was present, and was called on by the defendant to witness the payment of said hire. He also proved, by this witness, that in 1836, the plaintiff furnished clothing for the children of *Harriet*. That the defendant stated, in the presence of this witness, that there was an agreement between the plaintiff and defendant, by which the plaintiff was to clothe the children of *Harriet*, and that the defendant was to pay hire for *Harriet*, until the plaintiff thought proper to take said *Harriet* and her children home. The plaintiff, further to maintain the issues joined on his part, proved, by another witness, that in 1838, the defendant came to the plaintiff's, and asked the plaintiff, whether he had the clothing for *Harriet's* children? that the plaintiff brought the cloth out and cut it off, when the defendant said, the plaintiff had not given enough, when the plaintiff told defendant to cut it off; that the plaintiff stated to the defendant that he should, the next year, take said servants home, that they were old enough to earn their clothes; that the defendant then said, that *Wash-*

ington, one of the children of *Harriet*, was becoming useful to her, and asked the plaintiff to let him stay with her? the defendant said, that *Mary*, one other of *Harriet's* children, should be put out near her mother, who could attend to her; that the plaintiff then said, that he could hire out and attend to his own servants. He further proved, by the same witness, that in the latter part of 1838 or 1839, the defendant being again at the house of the plaintiff, held twenty-five cents in her hand; that this witness being the grand-son of the defendant, asked her for it; that the defendant turned to the plaintiff and said, that she had brought it to pay for the hire of *Harriet*, and paid it, accordingly, to plaintiff. He further proved, by the same witness, that in 1840, the defendant asked the plaintiff, if he would pay the doctor's bill for said negroes? that the plaintiff said no, that such was not the contract; that the defendant said, that she knew the agreement was, that the only expense to which the plaintiff should be put, was the clothing of the children, but she said, that she was not able to pay the doctor's bill, when the plaintiff said, that if she would bring the bill to him, he would get the doctor to separate the items, and would pay them.

The defendant, then, to maintain the issues joined on her part, proved, by a competent witness, that he had been the family physician of the defendant for thirty-six years; that shortly before the commencement of this suit, he met the plaintiff in the road, when the plaintiff asked witness if he did not know that negro *Harriet* belonged to him, when witness said to the plaintiff, that he had never heard any such thing; that he had heard, that she had been given, conditionally, by the defendant to the wife of the plaintiff, provided she survived the defendant; that the plaintiff said, that he had supposed all the world knew that said negroes belonged to him; that he, the witness, asked the plaintiff how he claimed title to said negroes? to which he, the plaintiff made no reply, but said that he could prove that he had always received hire for *Harriet*, and clothed her children.

The plaintiff then proved, by this witness, that at a subsequent period the plaintiff asked him to separate the items of

charge in his bill against defendant, for his attendance on said negroes, which the plaintiff said he would pay, but the witness declined to do so, unless at the request of the defendant, who, upon being consulted, refused to consent.

The defendant further proved, by another witness, that negro *Harriet* was born in the possession of the defendant, and continued in her possession up to the commencement of this suit. The defendant further proved, by this witness, that *Mrs. Isaac*, the wife of the plaintiff, died in 1834. The defendant further proved, by another witness, *W. W. Hall*, that he went to the defendant's house on the day the plaintiff went there to demand said negroes; that when he got there, the plaintiff and *Wm. Williams* were there; that when the plaintiff demanded the negroes, he, the witness, (being the grand-son of defendant,) told plaintiff that he should not have them unless he took them lawfully; that he, the witness, asked the plaintiff how he claimed the negroes, but that the plaintiff would not satisfy him; that the defendant stated that she had only given *Harriet* to *Mrs. Isaac*, the daughter of defendant, if she should survive her, the defendant, but that she never intended *Harriet's* children for plaintiff, or his wife, defendant's daughter. The witness does not recollect whether the plaintiff made any reply.

The plaintiff then proved, by a competent witness, that in 1838, 1839, or 1840, *Wm. Hall*, the last witness for defendant, told this witness, that he had just come from his grandmother's, (the defendant,) and that he had told his grandmother that she was a great blockhead to raise said negro children for the plaintiff.

The defendant further proved, by competent testimony, that when, in March 1841, the plaintiff went, with a witness, to the house of the defendant, to demand of her the said negroes, the defendant told the plaintiff he should not have them; that she wanted them to pay her debts, and that when that was accomplished, he the plaintiff, and the *Halls*, her children and grand-children, should have them. And she, the defendant, further proved, by another competent witness, that he, the witness, went to the house of the defendant, who is his grand-

mother, in March 1841, and found the plaintiff, who had gone there, with a witness, to demand the said negroes; that the plaintiff said he had come for the negroes, and would have them, when the witness, who was irritated at plaintiff's conduct, said he should not have them, unless he recovered them by law; that the defendant then declared, in the presence of the plaintiff, that she had never intended the children of *Harriet* for the plaintiff or his wife, in any event; that she, the defendant, had given *Harriet*, the mother of the other negroes sued for in this action, to the plaintiff's wife, who died in 1834, provided that she survived her, the defendant. And the witness, who gave this evidence, upon being interrogated, said, that he had no recollection that the plaintiff made any answer to this remark of the defendant.

And the defendant further proved, by several witnesses, that she is now nearly or quite eighty years of age, and has little or no property, except the negroes sued for in this action; and that she has a daughter living, who has children, and several grand children, the children of another daughter now deceased.

The defendant prayed the court to instruct the jury:—

That if they find, from the evidence, that the negro *Harriet*, in the proeeedings mentioned, was verbally given by the defendant to plaintiff's wife in her life time, but that there was no express delivery of such negro to the plaintiff, or his wife, in pursuance of such gift; and that the sole use and possession of such negro, was not transferred to the plaintiff or his wife; that then the supposed gift was void, and the verdict of the jury must be for the defendant.

The plaintiff objected to said prayer, and on his part prayed the court to instruct the jury:—

That if they should believe, from the evidence, that at various times, from 1834 to 1840, the defendant acknowledged the title to said negroes to be in the plaintiff, and that the defendant, during that period, paid hire for *Harriet*, and that the children of *Harriet* were clothed by the plaintiff, by agreement between the plaintiff and the defendant. The defendant, at the time she paid the hire and received the clothes, acknowledging the title in said negroes to be in the plaintiff, and requested the plaintiff to sell said property; that then such

payment of hire, and acknowledgment of title, if believed by the jury, is evidence of title in the plaintiff to the negroes in controversy.

The court granted the prayer of the defendant, and rejected the prayer of the plaintiff, as made;—but granted it with the following modification:—

But if the jury should be of opinion, that the admissions of ownership and payment of hire were adopted as a substitute for the delivery of possession, that these admissions are not competent to convey title to the property, unless accompanied with previous delivery.

To the refusal of the court to instruct the jury, as prayed by the plaintiff, and to the instructions given by the court to the jury, the plaintiff excepted.

The plaintiff then prayed the court to instruct the jury:—

That the question to be decided by the jury in this case, is, whether the plaintiff in this action has title to the property in controversy; and that if they should believe, from the evidence, that the defendant has, upon all occasions, acknowledged the title of said negroes to be in the plaintiff, and has treated the same as the property of the plaintiff, then that said plaintiff is entitled to recover.

The court rejected this prayer, and the plaintiff excepted.

The plaintiff, then, further prayed the court to instruct the jury:—

That if the jury believe the evidence offered on the part of the plaintiff, of the admission and declarations of the defendant, relative to the manner or terms on which she held the negroes in controversy, that she paid hire for one of them to the plaintiff, and held the same, and the other negroes as the slaves of plaintiff, always admitting them to be the negroes of the plaintiff, as stated by the defendant. Then in order to maintain the issue joined on his part, it is not necessary for the plaintiff to prove, by a witness, present at the time of the actual delivery of these negroes, at the time his title is supposed to commence; but the delivery, and all the circumstances necessary to prove title in the plaintiff, may be inferred from the proof offered in this cause, as above stated, if the same be believed by the jury.

The court refused to give this instruction, as it was prayed, but granted it with this modification:—But if the jury should also believe, that such admissions of ownership and payment of hire, and the other acts mentioned in this prayer were adopted as a substitute for the delivery of possession, that then such admissions, payment of hire, and other acts, are not competent to convey title to the property, unless accompanied with previous delivery.

The plaintiff excepted to the refusal of the court to grant his prayer, and to the instruction given by the court to the jury.

The plaintiff then prayed the court to instruct the jury:—

That if the jury should believe, from the evidence in this cause, that the defendant hired the negroes mentioned in this suit from the plaintiff, and annually paid to the plaintiff hire for the same up to the commencement of this suit, that such hiring by the defendant, is an admission of title in the plaintiff.

The court refused to grant this instruction, as prayed, but granted it with this modification:—That such hiring and payment of hire, does not preclude the defendant from shewing, that she had not divested herself of title, according to the mode pointed out by law.

The plaintiff excepted to such refusal, and also to the instruction given by the court.

The plaintiff then further prayed the court to instruct the jury:—

That if the jury should believe, from the evidence in this cause, that after the death of the plaintiff's wife, the defendant, *bona fide*, hired said negroes from the plaintiff, and annually paid him hire for the same, down to the commencement of this suit, then her possession was the possession of the plaintiff.

The court, (Stone, C. J., Key and C. Dorsey, A. J.,) refused this prayer; but gave the instruction with this modification:—That such possession of the plaintiff is not such a possession as is required by law to make a valid parol gift. To which refusal of the court, and also to the instruction given as aforesaid, the plaintiff excepted.

The plaintiff prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By ALEXANDER for the appellant, and
C. C. MAGRUDER and J. JOHNSON for the appellees.

ARCHER, C. J., delivered the opinion of this court.

The court below seem to have considered, that the plaintiff could only, from the evidence adduced in the cause, sustain his claim to the slaves in controversy, in virtue of a gift made of them by the defendant, and that to support such a claim thus founded, it was indispensable for him to show an express delivery of the negroes to him in pursuance of the gift, and the transfer of the use and possession, in pursuance of the act of 1763, ch. 13.

With this view of the case we cannot agree. The plaintiff, on his part, had offered evidence of the payment of hire; that he had furnished clothes for the children of *Harriet;* that the defendant had acknowledged his right to the negroes, and his power to sell them. These were all facts from which the jury may have inferred, that the plaintiff had acquired a title to the negroes in controversy, otherwise than by a gift.

We by no means intend to intimate, that from the whole of the evidence in the cause, the jury were bound so to find, but only to say, that from the facts offered by the plaintiff, which have been referred to, the jury were at liberty so to find.

The defendant, on her part, had offered evidence from which the jury might find a parol gift of the negroes to the plaintiff's wife; and on the hypothesis of the existence of such a gift, to make it valid by a true construction of the act of Assembly, the jury must have found that there was an express delivery of the negroes, and the transfer of the use and possession of the negroes from the defendant to the plaintiff. But evidence of a witness who saw the delivery, was not necessary. The delivery, like other facts, may be proved by inferential testimony.

The above remarks present our views of the law of the case, and it will be only necessary to apply these principles to the prayers and instructions acted upon and given by the court below.

There was evidence to support the prayer offered on the part of the defendant, and it contains a true exposition of the law, on the supposition, that the claim of the plaintiff rests on a parol gift of the subject in controversy.

The plaintiff's first prayer should have been granted without modification, as we have seen that the facts therein stated furnished evidence of title in the plaintiff.

This prayer, as modified, ought not to have been given as an instruction to the jury. There was no evidence that the facts therein stated were adopted as a substitute for the delivery of possession. The court might have instructed the jury, if they found that the plaintiff's claim was founded on a parol gift of the negroes, that then the facts inserted in the plaintiff's first prayer did not conduce to show title in the plaintiff, unless they should infer, from such facts, that there had been a delivery of the negroes. This, however, they did not do, and the modified instruction they did give, being obnoxious to the objection above adverted to, we think was erroneous.

The court rightly rejected the second prayer of the plaintiff, which excludes, altogether, the evidence offered on the part of the defendant, and the inferences the jury might lawfully deduce from such evidence. We cannot agree with the counsel for the appellant, that the acknowledgments adverted to in the prayer, estopped the defendant from relying on her defence. We have not considered the doctrine of estoppel, as existing between landlord and tenant, as at all applicable to such a case. No authority has been cited which conduces to such a conclusion.

From the remarks heretofore made, it follows, that the court were in error in refusing to grant the plaintiff's third prayer. Delivery may be inferred from facts and circumstances, and the facts and circumstances detailed in the prayer were such, that the jury were at liberty to draw the inferences claimed to be deducible from them.

For the reasons above stated, the court were in error in granting the prayer as modified.

There was no evidence in the cause, that all the negroes were hired. The evidence on this subject only applies to *Harriet*. For this reason the fourth prayer was rightly rejected

by the court, and the granting it with the modification, was, for the same reason, erroneous.

This instruction, as prayed, if it had been confined to negro *Harriet*, would have been right, and so, also, would the instruction, as modified; for although she should have been found to have admitted the plaintiff's right, she was not, on that account, debarred from showing that the plaintiff had no title.

The fifth prayer of the plaintiff is liable to the same objection as the fourth; and the court were right in rejecting it, for another reason: whether the possession of the defendant was the possession of the plaintiff, depended on the enquiry, whether the plaintiff's title was derived *aliunde*, the gift; if it was derived from the gift, then the defendant's possession would not be the plaintiff's, under the circumstances assumed, unless the jury should find, that the gift was accompanied with the delivery of possession.

The court, we think, were in error in granting the prayer as modified by them, because, by granting it, the court decided the matter in controversy between the parties, which could alone, from the evidence, be determined by the jury.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

CHRISTIAN SHEPPARD, ET AL., *vs.* THE STATE, USE OF DANIEL WEISEL, ATTORNEY FOR CLAIMANTS.—*December* 1845.

A party for whom a sum of money is levied by the commissioners of a county, has a remedy upon the collector's bond for his payment. His rights are within the very terms of the bond.

The collector's bond is also answerable to a party for whom money is levied, who has given up to the collector the order of the commissioners on him, and received in lieu thereof, his due bill.

Where such a party has assigned away only a portion of his claim to another, or portions of it to several, who, also, obtained the collector's due bill, the bond is not answerable to such assignees; otherwise it would sanction a principle most burthensome to the securities.

Neither is the collector's bond responsible, where a bill of exchange, or order, drawn by the assignee of a claimant, under the levy, was accepted by the

collector, unless such acceptance were produced at the trial, to show it was not outstanding in the hands of third parties.

An accepted bill, unless drawn on a particular fund, does not operate to invest the payee with the character of an assignee of the fund.

APPEAL from *Washington* county court

This was an action of *debt*, brought on the 19th November 1843, on the bond of the appellant and others, dated 16th May 1840, conditioned for the performance of the office of collector of *Washington* county, and the several duties required of him by law.

The plaintiff filed a list of claims and statement of facts, viz:

List of claims against Christian Sheppard, late Collector of Taxes of Washington county, in the hands of Daniel Weisel, as attorney for Collection, viz:

1.—*O. H. Williams'* order in favor of *Geo. Updegraff*, for one day's attendance, as a witness, to the grand jury, at November term 1840, of *Washington* county court, - - - -		$1 00
2.—*C. Sheppard's* due bill to *G. Brewer*, of 12th Jan'y 1842, for - - -		11 43
3.—*C. Sheppard's* due bill to *J. Snider*, of 6th June 1842, with interest from 28th Dec'r 1841, for - - -		23 00
4.—*John T. Mason's* order on *C. Sheppard*, as collector of the taxes, in favor of *A. Armstrong*, dated Dec'r 17th 1840, and accepted same day, by *C. Sheppard*, for - - -	$106 35	
Cr. paid Oct'r 13th, 1842, - -	18 81	
		87 54
For use of *Geo. Fechtig*, exc'r of *M. Hammond*.		
5.—*O. H. Williams'* order on *C. Sheppard*, as late collector for *Washington* county, dated 9th Oct'r 1841, in favor of *John Carr*, and accepted same day by *C. Sheppard*, late collector, the		

same to be charged to *Gen'l Williams'* account, for monies received, as collector, for him, for - -	$166 00		
Cr. Dec'r 30th, 1841, - -	8 76		
		$157	24
For use of *D. Weisel*, attorney for *Lot Ensey & Co.*			
6.—Account of *Robert Catron*, against *C. Sheppard*, for bal. on tax book for 1840, - - - - -	213 76		
Cr. in judgment already entered in No. 278, app's Mar. T. 1843,	52 83		
		160	93
7.—*John A. Weaver's* order, in favor of *Wesley Jefferson*, dated 8th June 1840. Accepted 7th Oct'r 1840, by *C. Sheppard*, collector, for - -	211 30		
Cr. 21st Mar. 1841, $115 00			
7th Feb. 1842, 21 00			
	136 00		
		75	30
For use of *Cunningham & Baker.*			
8.—*James Condy's* order on *C. Sheppard*, dated 4th Sept. 1841, in favor of *Messrs. W. & T. Yeakle*, and accepted 6th Nov'r 1841, by "*C. Sheppard*," for - - - -		100	00
		$616	44
Deduct first order, (No. 1,) - -		1	00
		615	44
Interest on all the orders to date of judgment, - - - -		120	24
		$735	68

Interest on each of the above items to be properly calculated from the times when due, and to be added; and the above principal of $615.44, to bear interest from the date of the judgment, if the court give judgment on the claims for the plaintiff.

The above claims having been in the hands of *Daniel Weisel*, as attorney for collection, before November term, 1842, of *Washington* county court, and suit upon the bond or bonds of said *Christian Sheppard*, as collector, and his securities, and the securities having agreed to allow a judgment or judgments for the same, with the usual stay of execution, provided the said claiments are legally entitled to recover. And the said securities, by *Jervis Spencer*, their attorney, having examined the same, and being advised that they are not legally bound for the same, it is agreed between the said securities and the said claiments, by the said respective attorneys, that a suit or suits on said bonds of said collector, may be docketed against said *Sheppard* and his securities, as of November term 1842, and brought on by regular continuances, to the present November term 1843, of said court; the said suits to be for the use of *Daniel Weisel* as attorney for the claimants, on the claims in the foregoing list, and a statement of facts to be agreed on.

And in case the court should determine, that the claimants and drawers of said orders are entitled to recover on said bonds, or either of them, in all or any of said claims in said list, in the case so to be docketed and tried or argued, then judgment is to be entered at this present term, for so much as the court shall determine can be recovered on said bond or bonds, for the use of *Daniel Weisel*, as attorney for the respective claimants, with a stay of execution for six months; the said securities reserving the right of appeal, if the said questions of law be determined against them in the county court; and the said claimants reserving the right of appeal likewise.

It is further agreed, that if any of the claims in the foregoing list should be determined as recoverable on said *Sheppard's* bond, for the year 1839, the court may give judgment for the same in this suit, on the bond, for the year 1840, the obligors being the same on both bonds.

It was also agreed, that the books of the commissioners of *Washington* county present the following:

That the levy for the year 1840, was made on the 2nd day of June of that year, amounting to $33,264.15, as follows:

Amount of list of allowances,		$22,712 54
Commission for collecting,		1,496 98
For roads,		5,375 00
		$29,584 52
Surplus,		3,580 00
		$33,164 52

That in the said list of allowances are the following items:

For jurors and State's witnesses,		$35 00
Bridge fund,		3000 00
To *Otho H. Williams*,	$686 70	
Same,	42 53	
		$729 23

That the levy for *O. H. Williams*, above was for fees due him by the county.

That appended to said "list of allowances" and levy, is the following order:

The value of property in this county being $10,080,045, it is ordered by the commissioners, that a rate of 33 cents per the $100 worth of taxable property, be collected by the collector, which will raise the sum of $33,264.15; which sum is to be applied by him to the aforegoing charges, including his commission for collection, and the payment of the amount appropriated for the repairs of the public roads, under the direction of the commissioners.

June 2d, 1840. Test, GEO. W. POST, Cl'k

And that *Christian Sheppard* was appointed collector of the taxes for *Washington* county, May 4th, 1840, and on June 2nd, 1840, he accepted the appointment, and exhibited the bond dated 16th May 1840, which was approved.

It is further agreed, that the following are the facts in relation to the claims filed in this cause, and embraced in the list accompanying the declaration, and numbered from 1 to 8, inclusive.

No. 1.—Is an outstanding order, which was not presented to the collector until after he had closed his account with the commissioners, for the year 1840.—And, on such settlement, the collector had overpaid the appropriation for the county

court expenses for that year; the commissioners having made a general appropriation for such expenses in June of that year.

No. 2.—A due bill to *George Brewer*, of 12th January 1842, for $11.43.—This was given by *Sheppard*, for a balance due to said *Brewer* as a supervisor of roads, for the year 1840. And when said due bill was given, the said *Brewer* gave up to said *Sheppard*, the commissioners' order on him; the said *Brewer* having called on him then for a settlement.

No. 3.—A due bill to *Jacob Snider*, of 6th June 1842, with interest from 28th December 1841, for $23.—This was given for a balance due on an order of *John A. Wever*, in favor of *Peter Stover*, for $30.

The commissioners made a levy in 1840, for the purpose of building a bridge, and the said *Wever* became the contractor for building it. He afterwards obtained an order from the commissioners on said bridge fund, and then gave an order on the collector for $30, to said *Stover*, who transferred it to *Jacob Snider*, which was lifted by the collector when he gave said due bill.

No. 4.—In the year 1840, the commissioners made a levy in favor of *George W. Smith*, for a printer's bill. The collector paid part of it to said *Smith*, who then directed the collector verbally, or orally, to pay the residue to said *John T. Mason*, and this order was given by *Mr. Mason* to *Alexander Armstrong*, for said residue; and was accepted by *Sheppard*, as appears on said order.

No. 5.—In the year 1840, the commissioners made a levy in favor of *Otho H. Williams*, of which an amount greater than that expressed in this order, was due the said *Williams* at the time of the drawing and acceptance of the same.

No. 6.—*Robert Catron's* claim, for $160.93.—That is a balance due *Catron*, on certain orders in favor of said *Catron* from individuals, for whom specific levies were made by the commissioners, in the years 1839, and 1840; and unsatisfied.

No. 7.—*John A. Wever's* order, in favor of *Wesley Jefferson*, of 8th June 1840, for a balance, after allowing credits endorsed on it, for $75.30.

The commissioners made a levy for building a bridge, in 1840, and the said *Wever* was the contractor for building it.

This order was drawn by said *Wever* on said *Sheppard*, more than the amount of said order being then due said *Wever*, for said bridge; and the said *Wever* charged with said order, when accepted by said *Sheppard*.

No. 8.—*James Condy's* order on *C. Sheppard*, of 4th September 1841, in favor of the *Messrs. Yeakle*, for $100. *James Condy* was entitled to a levy made by the commissioners in his favor, as a member of the board, in 1840, and he executed said order for the said sum; the said levy being then due to him. The said *Sheppard*, afterwards, gave a due bill to the said *Messrs. Yeakle*, payable in ten days, for the amount, which the said *Yeakles* took, and held for some time; they still retaining the said order. The said due bill was then returned to said *Sheppard*, and received by him; and suit was afterwards brought on said order, and a judgment rendered by *George W. Smith, Esq.*, a justice of the peace, for the amount thereof; which was superseded for twelve months, from and after the 18th day of April, 1842, and the superseder became insolvent before the judgment became due.

We agree to the foregoing statement of facts :

D. Weisel,
Attorney for plaintiff.
Wm. Price,
Jervis Spencer,
Attorneys for defendants.

The attorney of the plaintiff having calculated the interest on the several claims, sued on in the above, to the date of the judgment, viz: 9th April 1844, amounting, in all, to $120.24, agreed, that if any errors be discovered in said calculation, the same shall be corrected.

The following are the orders and claims referred to in the aforegoing list of claims:

No. 1.

By Washington County Court, November Term 1840.

Ordered, by the court, that *Washington* county pay unto *George Updegraff* the sum of one dollar, for one day's attendance, this term, as a witness to grand jury.

O. H. Williams, Cl'k.

No. 2.

Hagerstown, January 12th, 1842.

Due *Mr. George Brewer*, eleven dollars and forty-three cents, for value received.

$11 43. C. SHEPPARD.

No. 3.

Hagerstown, June 6th, 1842.

Due *Jacob Snider*, twenty-three dollars, for value received, with interest, from 28th December 1841.

$23 00. C. SHEPPARD.

No. 4.

$106 35.—*Mr. C. Sheppard*, collector of the tax for *Washington* county, will please pay *A. Armstrong* one hundred and six dollars and thirty-five cents, and oblige,

December 17th 1840. JNO. THOMPSON MASON.

Accepted, 17th December 1840. C. SHEPPARD.

October 13th, 1842. Paid on the within order eighteen dollars and eighty-one cents.

$18 81. GEO. FECHTIG.

No. 5.

Hagerstown, Oct. 9th, 1841.

$166.—Sir, pay to *John Carr*, or order, one hundred and sixty-six dollars, and charge the same to my account, for monies received, as collector, for me. O. H. WILLIAMS, Cl'k.

To *Christian Sheppard*,

Late collector for *Washington* county.

Accepted October 9th 1841.

C. SHEPPARD, late Collector.

1841, December 30.—By cash to *D. Weisel*, on settlement of acts between him and *Sheppard*, on tax book, 1840, $8.76.

CHRISTIAN SHEPPARD, late Collector.

No. 6.

To Robert Catron, Dr.

To bal. on Tax Book for 1840,	$213 76
Interest fr. 1st Feb'y 1841.	
Cr. this am't in confession of judgm't.	52 83

No. 7.

$211 30.—Two hundred and eleven dollars.—Settled with *Westley Jefferson*, and remains due him, $211 30, it being for value received of him. As witness my hand, this 8th of June 1840. JOHN A. WEVER.

October 1840.—Pay *Cunningham & Baker*, or bearer.

WESTLY JEFFERSON.

Accepted October 7th 1840.

CHRISTIAN SHEPPARD, Collector.

On the back of the foregoing, (No. 7,) appear the following endorsements:—

March 31st, 1841.—Pd. on the within, $115 00

Feb'y 7th, 1842.—Received on the within, 21 00

No. 8.

Hagerstown, September 4th, 1841.

$100.—*Mr. C. Sheppard* will please pay *Messrs. W. & T. Yakle* one hundred dollars. And oblige yours, &c.

JAS. CONDY.

Accepted, 6th November 1841.

C. SHEPPARD.

Upon this statement of facts, the county court entered judgment for the plaintiff, and for the whole amount of the claims filed, with interest from 9th April 1844, and costs.

The defendants appealed to this court.

The cause was argued before ARCHER, C J., DORSEY, MAGRUDER and MARTIN, J.

By JERVIS SPENCER for the appellants, and

By WEISEL for the appellees.

ARCHER, C. J., delivered the opinion of this court.

Upon the case stated, there can be no doubt of the right of the plaintiff to recover, so far as regards any claimant who held the original levy. His rights would be within the very terms of the bond.

Such of the claimants as held due bills, will also be entitled to a judgment. They obtained equitable assignments of the

orders The due bills were promises to pay to them the amount of such assignments, and they might maintain an action in their own names on the bond, or use the names of their assignors.

Some of these claimants, however, obtained drafts on the collector. These drafts, except, perhaps, No. 5, are bills of exchange, being payable on no contingency, and not out of any particular fund; and the payees could never recover on the original consideration against the drawers, without proving notice of non-payment of the acceptances which is not done. The payees, then, would have no remedy against the drawers without such proof, and their only remedy for the recovery of the sums due them, would be against the collector on his acceptances.

The holders of the levy could not sue, unless they could produce the acceptances, to show they were not outstanding in the hands of third parties. Indeed, this would be impossible for them to do, because the case stated shows, that these acceptances are outstanding in the hands of the payees.

In what condition would the collector be placed, if the original holders of the levy could sue him on the original consideration? Certainly the payees would have a right to sue and recover on the acceptances, and if so, he would be liable to a double recovery.

So far, therefore, as regards the claims arising on the drafts or bills of exchange, the drawer's remedy on the original levy is gone. They cannot sue on such levy, because they have drawn bills which have been accepted, and which are now outstanding. The holders, therefore, of these acceptances could not sue in the name of the drawers: nor can the claimants, on these bills of exchange, sue as assignees. Even an accepted bill, unless drawn on a particular fund, does not operate to invest the payee with the character of an assignee of the fund. The case, in 5 *Hill*, 418, is decisive upon this point. See, also, *Harrison vs. Williamson*, 2 *Edw. Rep.*, 430, where it is said, "a bill of exchange has not the effect of an assignment of the money for which it is drawn, in the hands of the drawee, unless, perhaps, where it is drawn on a

particular fund; and then, indeed, by the *Law Merchant*, it loses its character as a bill of exchange. The remedy of the payee of such bill, is only to be found in a suit on the accepted bill.

Some of the claims are on orders in favor of individuals for portions, only, of the claim of the drawers, for which, levies had been made in their behalf. To make the securities liable in such cases, would sanction a principle most burthensome to securities, and would put it in the power of individuals, in whose behalf levies should be made, by creating numerous assignees of portions of such levies, to burthen the securities with costs, in case of a failure of the collector to pay, to which they would not be subjected, if there had been an entire assignment.

It will follow, from the above principles, that the following claims ought to be allowed, viz: Nos. 2 and 6. And the following claims rejected, Nos. 1, 3, 4, 5, 7 and 8; and we shall direct judgment to be entered accordingly, such being the judgment the county court ought to have entered.

JUDGMENT REVERSED, &c.

JACOB BREWER AND THOMAS DRAPER, *vs.* MICHAEL P. SMITH.—*December* 1845.

By the act of 1791, ch. 68, an appeal is given from the judgment of a magistrate to the next county court; but such appeal shall not operate as a stay of execution, or supersedeas of the judgment, unless an appeal bond be filed at the time of taking such appeal.

Under this act, the appeal might be taken at any time after the rendition of the judgment, provided it be taken to the county court next thereafter.

By the act of 1818, ch. 160, appeals not taken to the next county court, shall not be dismissed; unless the court shall be satisfied, that the appellant had notice of the judgment, at least ten days before the sitting of the county court.

The sole object of the act of 1825, ch. 68, was to provide a remedy, where executions on magistrate's judgments had been levied within fourteen days after their rendition; and in cases where an appeal had been taken, and appeal bond filed, within such fourteen days, it was to operate as a supersedeas of an execution levied.

The policy of the acts of 1818, and 1825, stated.

The act of 1829, ch. 236, prescribes the terms, conditions, and effect, of appeals from magistrate's judgments; and repeals, except in the city of *Baltimore*, the provisions, in relation to such appeals in the acts of 1818 and 1825, and is a substitute therefor. It was not designed to repeal any part of the act of 1791.

The 7th sec. of the act of 1831, ch. 290, is declaratory only, and does not change the construction of the act of 1829.

In an action upon an appeal bond, with condition to prosecute an appeal from a judgment of a justice of the peace, with effect, &c., it is no defence, since the act of 1829, ch. 236, that the bond was executed more than sixty day after the date of the judgment therein recited, and from which the appeal was taken.

APPEAL from *Washington* county court.

This was an action of *debt*, brought on the 13th January 1844, by the appellee against the appellants, on the bond of *Rudolph Herr, Jr.*, *Jacob Brewer*, *Thomas Draper*, and *Rudolph Herr, Sr.*, dated the — October 1841, reciting:—

"Whereas the above bound *Rudolph Herr, Jr.*, thinks himself aggrieved by a judgment rendered against him on the 24th day of May last, by *Daniel Hauer, Esq.*, one of the justices of the peace for the said county, at the suit of *Michael P. Smith*, for the sum of $79.72, debt, and 83⅓ cents, costs, with interest from the 24th day of May 1841; from which judgment the said *Rudolph Herr, Jr.*, is about to appeal to the next county court for *Washington* county, before the judges thereof.

"Now, the above obligation is such, that if the said *Rudolph Herr*, shall not prosecute his appeal at the county court of *Washington* county, next succeeding the date of this appeal bond, with effect, according to the directions of the act, entitled: "An act for the speedy recovery of small debts out of court, and to repeal the acts of Assembly therein mentioned;"—and also pay and satisfy the said *Michael P. Smith*, his executors, administrators and assigns, in case the said judgment shall be affirmed, as well as the debt, damage, and cost, adjudged by the said *D. Hauer, Esq.*, as also all costs and damage that shall be awarded by *Washington* county court, when the said appeal shall be heard, tried and determined, then the above bond to be and remain in full force and virtue, otherwise to be of no effect."

To the declaration, assigning a breach of the condition of the said bond, the defendants pleaded:—

1st. That the said *Rudolph Herr, Jr.*, in the said declaration mentioned, did prosecute, with effect, the said appeal, in the condition of the said writing obligatory mentioned, at the county court of *Washington* county, to wit, at November term 1842 of said court, as by the record and proceedings thereof still remaining in said court, at, &c., more fully and at large appears, and this the said defendants are ready to verify, by the said record. Wherefore, &c.

2nd. That although they, the said defendants, did sign and seal the said pretended writing obligatory, in the declaration mentioned, yet the same was so executed more than sixty days after the date of the judgment therein recited, and from which said appeal was taken. Wherefore, the said defendants say, that the said pretended writing obligatory, is void in law, and this the defendants are ready to verify. Wherefore, &c.

The defendants relinquished their *first* plea, and the plaintiff demurred generally to the *second* plea, on which the defendant joined. The county court sustained the demurrer, and the defendants appealed to this court, from the judgment rendered thereon for, &c.

The cause was argued before Archer, C. J., Dorsey, Chambers, Magruder and Martin, J.

By Weisel for the appellants, and
By Spence for the appellee.

Dorsey, J., delivered the opinion of this court.

By the act of 1791, chap. 68, entitled, "an act for the speedy recovery of small debts out of court, and to repeal the acts of Assembly therein mentioned," an appeal is given from the judgment of a magistrate "to the next county court:" but such appeal, (it is provided,) shall not operate as a stay of execution or supersedeas of the judgment, unless an appeal bond were filed at the time of making the appeal. Under this act of Assembly, the appeal might be taken at any time after the rendition of the judgment, provided it be taken to the county court, next

thereafter. Many persons having lost the benefit of appeal, on judgments given by magistrates but a short time before the succeeding court, the legislature, designing to remedy that evil, by the third section of the act of 1818, ch. 166, enacted, that, thereafter, "no appeal, from the judgment of a justice of the peace to the county court, shall be dismissed, because the same had not been prayed to the county court, next after the rendition of such judgment, unless the court shall be satisfied, that the appellant had notice of such judgment at least ten days before the sitting of said county court." The act of 1825, ch. 68, entitled, "an act regulating appeals from magistrates' judgments," has no influence upon the question now before us, which is, simply, whether an appeal will lie, from the judgment of a magistrate to the next county court, more than sixty days after the rendition of the judgment. The sole object of the act of 1825, was, as shewn by its first section, to provide a remedy, where executions on magistrates' judgments had been levied within fourteen days after the rendition of such judgments. This is most manifest from the second section of that law, which enacts, "that nothing herein contained, shall be construed to affect, in any way, the time allowed for taking appeals from magistrates' judgments, or the legal operation of appeal bonds, otherwise than as in the first section of this act is expressed." The only design imputable to this act, was to provide, that where an appeal shall be taken, and an appeal bond filed within fourteen days after the judgment rendered, an execution already levied on such a judgment should be thereby superseded. The legislature having, by the act of 1818, chap. 166, prohibited the dismissal of an appeal from a magistrate's judgment, on account of its not being taken to the next county court, unless it were proved, that the appellant had knowledge of the judgment, at least ten days before the county court, next thereafter, it was found, that appellants, to whom such knowledge could not be brought home, might take their appeals, in many cases, nearly twelve months after the rendition of the judgments; if, indeed, under the act of 1818, there was, in such cases, any time limited for the taking of appeals. And it being deemed, or found by experience, that the fourteen

days allowed, by the act of 1825, for an appeal to be taken, and an appeal bond filed, so as to operate a supersedeas of an execution levied under a magistrate's judgment, was too short a time to remedy both the enumerated defects in those acts of Assembly, the third section of the act of 1829, chap. 236, was passed. By which it is enacted, "that from and after the passage of this act, it shall and may be lawful for any person, who may think him or herself aggrieved by the judgment of any justice of the peace, to appeal from said judgment to the county court, at any time within sixty days from the date of the same; provided, that the person so appealing shall give bond, as now required by law, with the condition, that the appellant shall prosecute his or her appeal at the county court, next succeeding the date of the appeal bond; which appeal shall have the same effect and operation as a supersedeas to any execution on such judgment, as if the appeal bond had been filed within the time now prescribed, and the judges of the county court shall receive and hear such appeal, in as full and ample a manner as if the same had been prosecuted at the county court, next after the rendition of the judgment, by the justice of the peace." This act, of 1829, chap. 236, was designed to repeal, (except in the city of *Baltimore*,) the aforementioned provisions of the acts of 1818, chap. 166, and 1825, chap. 68, and to become a substitute therefor. It was not intended to repeal any portion of the right of appeal conferred by the act of 1791, chap. 68; but was an extension of that right, in permitting, on the terms prescribed, a party to appeal from the judgment of a magistrate to the second county court, after its rendition; provided the appeal was taken within sixty days from the date of the judgment. The right to prosecute an appeal, to the next county court, after the rendition of the judgment, under the act of 1791, so far from being repealed, as has been contended, by the act of 1829, its continuing existence is distinctly recognized and referred to by the act of 1829; when, in reference to an appeal under it, it declares, that "the judges of the county court shall receive and hear such appeal in as full and ample a manner as if the same had been prosecuted at the county court, next after the rendition of the judgment, by the justice of the peace."

The seventh section of the act of 1831, chap. 290, was a mere declaratory enactment, and gave no other construction or operation to the third section of the act of 1829, than it was entitled to without it. The county court, therefore, very properly ruled good, the appellee's demurrer to the second plea of the appellants.

JUDGMENT AFFIRMED.

MARIA C. MILLER *vs.* THOMAS C. STUMP.—*December* 1845.

J, in the premises of a deed, recited, that he had covenanted, in May 1813, with *M*, to stand seized of land, to the use of *J*, for life, and to and for the use of *M*, his heirs and assigns, forever; and by the same deed it was witnessed, that the said *J* hath given, granted, and enfeoffed the same lands to *M*, his heirs and assigns, to and for the use of *J*, for life, and after his decease, to and for the use of *M*, his heirs and assigns, forever. The grantee, *M*, mortgaged his estate under this deed, in 1824; and *J*, the covenantor, died in April 1825. *M* applied for relief, under the insolvent debtor's act, in May 1825, several years before which he was married. HELD: that his widow was not entitled, at common law, to dower in these lands.

The act of 1818, ch. 193, gives the widow a right to dower in an equitable estate, but that right cannot operate to the prejudice of *H*, the mortgagee of that equity.

Where an equitable estate in land is mortgaged, and sells for more money than the mortgage debt, in some cases the widow may be entitled to a portion of the surplus, in lieu of dower; but it is a claim for which a purchaser of the equity is not answerable.

Where the land of the ancestor is sold, as incapable of division, and purchased by one of his children, who gives bond for the purchase money, yet never procures a conveyance, the widow of the purchaser cannot be endowed to the prejudice of the other children, lien holders, who have not been paid for their interest in their father's estate.

CROSS APPEALS from the equity side of *Harford* county court.

The bill in this cause, was filed on the 2nd August 1841, by *M. C. Miller;* and alleged, that *William F. Miller* was seized in fee, and possessed of several parcels of land, viz: "*Hall's Rich Neck*," "*Wind Mill Hill*," and "*Margaret's Mount*," described in a deed from *John Wilson* to *William Miller;* that in 1814, *W. F. M.* purchased, in fee, another part of "*Hall's*

Rich Neck," at a sale, made under the authority of *Harford* county court, by commissioners appointed by the said court, for the sale and division of the real estate of *Joseph Miller*, for which he paid the purchase money, and was in possession by the said commissioners, and so continued in possession of this and the other tracts of land, until the 21st May 1825, when he petitioned for the benefit of the insolvent laws, and conveyed his property to *Samuel Bradford*, a trustee, for the benefit of his creditors. That the trustee sold the *Wilson* lands to *T. C. Stump*, and the *Miller* lands to *Robert Parker, Jr.*, under whom *T. C. S.* now claims. That *Maria* and *W. F. Miller*, were married before 21st May 1825; that he died in 1840, and that *John Wilson* died 20th April 1825; that the appellant, upon the death of her husband, became entitled to dower, and has received nothing for it, nor in lieu of it; that *T. C. S.* has refused to assign his dower, or account with her for it. Prayer in conformity.

The answer of *T. C. S.*, admitted the marriage, and that *W. F. M.* had an equitable interest, at one time, in the lands mentioned in the bill. The conveyance from *John Wilson* to *W. F. M.*, was also admitted; that *W. F. M.*, during the life of *J. W.*, on 1st December 1824, conveyed all his interest, under *W's* deed, to *John Herbert;* that *Miller* had no interest, under *Wilson's* deed, of which his wife could be endowed, before the death of *W.*, and before that event took place, *M.* had conveyed all his interest, so as to preclude him from holding such an estate as his wife could be endowed of; that as respects the other parcel of land, *W. F. M.* never paid for it, and never had any conveyance of it, and only had an equitable title in it; and his estate was sold by his trustee, during his life, and hence his wife not entitled to dower, &c.

The cause was submitted for decree, on the following admissions and statement of facts, viz :—

It is admitted, that *John Wilson*, in his lifetime, and on and before the 26th May 1813, was lawfully seized, in fee simple, of the first parcel of land mentioned in the bill of complaint in this case, and there described as consisting of the tracts, called "*Hall's Rich Neck*," "*Windmill Hill*," and "*Mar-*

garet's Mount;" and that being so seized, the said *Wilson*, on the day above mentioned, duly executed and acknowledged the deed, a copy whereof is filed herewith, as part of this statement, to *William F. Miller*, the late husband of the complainant; and which deed was recorded, according to law. That said *Miller* resided with his grandfather, the said *John Wilson*, on said land, after the execution of said deed, and until the death of said *John Wilson*. That said *John Wilson* died on the 23rd day of April 1825, the said *Miller* then being in possession of said land, and continuing in possession until it was subsequently sold by the trustee, as hereinafter mentioned.

It is also admitted, that said *W. F. M.*, on the 1st December 1824, by deed of that date, mortgaged all his interest in said land to *John Herbert*, to secure the payment of a debt of $1000, as by a copy of said deed, herewith filed, will appear; and that on the 21st day of May 1825, the said *M.* applied for the benefit of the insolvent laws, and was, subsequently, finally discharged; and that upon his application, the lands aforesaid, together with all his other property, passed to *Samuel Bradford*, who was duly appointed the trustee for the creditors of the said *M.*, and authorised to sell all said property; that said trustee, under and by virtue of said authority, on the 28th April 1828, sold and conveyed to said defendant, all the interest and estate of said *M.*, in and to the lands herein mentioned, for the sum of $3045.00, under which said sale and conveyance, said defendant has continued to this time, seized and possessed of said land. That the said *Samuel Bradford*, trustee as aforesaid, sold said lands, to satisfy said mortgage, as well as the other debts of the said *William F. Miller*, and out of the proceeds of said sale, the said trustee paid to the legal representatives of said *Herbert*, the mortgagee aforesaid, the whole amount of debt and interest due on said mortgage, amounting to $1437.50; and the residue of the sales of said land, after the payment of costs, &c., was applied towards the payment of other creditors of said *Miller*.

It is also admitted, that *Joseph Miller*, the father of the said *William F. Miller*, was, in his lifetime, seized in fee of the

second parcel of land mentioned in said bill, (being the part therein described, as purchased from the commissioners to sell said *Joseph Miller's* estate,) and died seized thereof, on or about the year 1813, leaving the said *William*, and several other children, his heirs at law. That on the 16th March 1814, the said *William F. Miller*, as one of said heirs at law, filed a petition in *Harford* county court, for a commission to divide said estate, &c., under the act to direct descents; that a commission thereupon issued to five commissioners, appointed by said court, in pursuance of said act to direct descents, and the said commissioners, in due execution of the powers conferred on them, made return of their proceedings on said commission, whereby they determined, and so returned, that said land was incapable of division among the said heirs, without loss to all the parties concerned; and did further, in pursuance of their said powers, return to the said court their valuation of said lands, all which report was confirmed by said court. That all the heirs at law, and persons entitled to elect to take said land, at said valuation, refused to take said land at the valuation. Whereupon, said court ordered, that said land should be sold by said commissioners, and said commissioners, afterwards, and on the 2nd day of March 1816, sold the said parcel of land, upon the terms prescribed by said court, to the said *William F. Miller*, at the sum of $15 per acre, and took the bonds of said *William F. Miller*, payable to the respective heirs at law, aforesaid, for their several distributive shares of said purchase money, all which said sale and proceedings were confirmed by said court; and the bonds so given by said *William F. Miller*, for the purchase money aforesaid, were also approved by said court. That there remained due of the purchase money for said land to the heirs of said *Joseph Miller*, from said *William F. Miller*, and to *Dr. John Archer*, a creditor of said *Joseph Miller*, a sum equal to the sum for which the said *Bradford*, as trustee as aforesaid, sold the same, as hereinafter mentioned, to *Robert Parker*, exclusive of the expenses of selling the same, and that the same was sold by said trustee, to pay said purchase money and debt, as well as the other claims against said *William F. Miller*.

It is also admitted, that said *W. F. M.*, never received a deed of conveyance of the legal title from the said commissioners, for this last mentioned parcel of land, but that said *W. F. M.*, was put in possession thereof by said commissioners, immediately after said sale, and continued in the occupation and enjoyment thereof, until said land passed, with his other property, aforesaid, to the trustee, aforesaid, on the application of said *M.* for the benefit of the insolvent laws.

That said *Bradford*, trustee as aforesaid, sold said last mentioned land, in 1828, to *Robert Parker*, and that out of the proceeds of the sale of said land, which had formerly belonged, as aforesaid, to *Joseph Miller*, deceased, the whole residue due to the heirs at law and representatives of said *Joseph Miller*, under the sale made by said commissioners, was paid, as a preference claim; that the said *Robert Parker*, subsequently, and in the lifetime of said *William F. Miller*, sold and conveyed the said last mentioned land to said defendant, who has continued to hold the same, under the title thus derived, to this day.

It is also admitted, that the said complainant at the time of the application of the said *William F. Miller* for the benefit of the insolvent laws, as aforesaid, and for several years before, was the lawful wedded wife of said *William F. Miller*, and so continued until the time of his death, which occurred in or about the month of January 1841.

It is also admitted, that after the death of said *William F. Miller*, and on or about the 1st day of May 1841, the said complainant demanded of said defendant, her dower in the several parcels of land aforesaid, and that said defendant has refused to assign any part thereof, for dower therein, or to pay any thing on account thereof.

It is agreed, that if, on the foregoing statement of facts, the court shall be of opinion, that said complainant is entitled to dower in said lands, or any part thereof, then a decree to that effect shall be passed, and the amount of mesne profits or damages, if any, to which said complainant may be entitled, as accrued since the death of her husband, to be ascertained by the auditor, or proof directed to that point; or, if the court shall

be of opinion, that complainant is not entitled to dower in any part of said lands, then a decree to pass for defendant, each party reserving the right to appeal to the Court of Appeals.

The deed from *John Wilson* to his grandson, *William F. Miller*, purported to be in consideration of $500, and for natural love and affection, and declared, that "of all the messuages, farms, lands, tenements, and all other hereditaments, hereafter mentioned, he, the said *John Wilson*, doth hereby, for himself and his heirs, covenant, grant, and agree, to and with the said *W. F. M.* and his heirs, that he, the said *J. W.*, shall and will, from thenceforth, stand and continue, seized of and in, all the following tracts or parcels of land, &c., to and for the uses, intents and purposes, hereinafter limited; that is to say, to and for the use and behoof of him, the said *J. W.*, during his natural life, without impeachment for waste, and to and for the use and behoof of the said *W. F. M.*, his heirs and assigns, forever;" and the said deed then witnessed, that the said *J. W.* "hath given, granted and enfeoffed, and by these presents doth give, grant and enfeoff, the said *W. F. M.*, his heirs and assigns, the aforementioned lands and tenements, to have and to hold to the said *W. F. M*, his heirs and assigns, forever, for the use and trust following, to wit, to and for the use of the said *J. W.*, for and during his natural lite, without, &c., and after his decease, then to the use and behoof of the said *W. F. M.*, his heirs and assigns, forever, &c.

The deed from *W. F. M.* to *John Herbert*, was a mortgage, in the usual form.

On the 25th May 1843, the county court, (Archer, C. J., and Purviance, A. J.,) decreed, that *W. F. M.* had such an estate in the lands mentioned in the proceedings, as entitled his wife to dower, according to the strict construction of the act of 1818, ch. 193; and referred the cause to the auditor of the court, with instructions, and to state an account, allowing her dower, after the deduction of liens.

The auditor reported an account, which was ratified, and both parties appealed to this court.

The cause was argued before Dorsey, Chambers, Spence, Magruder and Martin, J.

By Archer and Bradford for the appellant, and
By Otho Scott for the appellee.

Magruder, J., delivered the opinion of this court.

Upon the appeal of *M. C. Miller*.

In this case the decree must be affirmed. The plaintiff in error, filed her bill of complaint in *Harford* county court, setting as a court of equity, and claimed dower, in the lands therein mentioned, and an account of rents and profits. The account was taken, and payment of the amount was decreed by the court below, but being less than the sum to which the plaintiff in error supposed herself to be entitled, she appealed from the decree.

It has been decided by this court, upon an appeal by the defendant in error, that the complainant in the case is not entitled to relief, in this suit. Of course it is unnecessary to decide, whether the accounts be according to the testimony.

DECREE AFFIRMED WITH COSTS.

Upon the appeal of *T. C. Stump*.

The defendant in error, is the widow of the late *William F. Miller*, and in her bill of complaint claims dower in several tracts of land, of which she alleges that her husband was seized, during their coverture.

Some of the lands were conveyed to her husband by *John Wilson;* and of the rest, her husband's father died seized, and the land descended to his children.

Of her claim, to dower in the lands conveyed by *Wilson*, we will first dispose.

It is admitted in the case, that after the marriage of the defendant in error, the lands were conveyed by *Wilson* to the husband. The deed bears date the 25th day of May 1813, and is a conveyance in trust for the use and behoof of said *Wilson*, during his natural life, and after his decease, to the grantee, (the husband of the defendant in error,) in fee. On the 1st of December 1824, the grantee mortgaged the same lands, to secure the payment of a sum of money which he owed to one *John Herbert*. He then applied for the benefit

of the insolvent laws, and his trustee afterwards sold the mortgaged premises to the plaintiff in error, for a sum which exceeded that due on the mortgage. *Wilson*, the grantor in the deed first mentioned, died before *Miller*, but some time after the execution of the mortgage.

Is the widow entitled to dower in these lands? According to the law of *Maryland*, she is not entitled. It may be, as has been suggested, that the decision of the courts of some of our sister States would entitle her to dower, if the real estate was situate in those States. But we do not take our law from those States. The law of *England* is the law of our State, in regard to dower, "except when and so far as it may be changed by our legislature;" and the *English* law, as we received it, did not give a widow dower in such an estate, as the husband had in these lands.

Our act of Assembly of 1818, ch. 193, is the only law of *Maryland*, which gives the widow a right to dower in an equitable estate; and that act as expounded by this court, in the case of *Hopkins against Fry*, (decided December term 1844,) does not give to the defendant in error, dower in this land. It was there decided, that the claim to dower in an equitable estate, can be asserted with success only when allowance of it cannot "operate to the prejudice of the rights of any but creditors, heirs, and the devisees in a will," executed subsequently to the passage of the law. It would operate to the prejudice of others, if in this case, when the equitable title had been parted with by the husband, during his life, the widow was allowed dower. The act of Assembly does not say, and it ought not to be construed to mean, that the widow shall be "entitled to dower, in lands, held by equitable title in the husband," *at any time* during the coverture.

The mortgaged premises, however, sold for more money than the debt secured by the mortgage, and it may be asked, whether she cannot claim, in lieu of one-third of the land, a portion of the surplus, or the interest, during her life, of one-third of the surplus? In some cases, it may be argued, that the widow is entitled to a portion of the surplus. It is not necesary, however, upon this appeal, to enquire if such be the

law of this case. If, indeed, she be entitled to receive anything, she is not to receive it of the purchaser, and he is the only person of whom she is now claiming it. He purchased and holds the land, free, and discharged from any claim of dower. So much of her claim, then, must be disallowed.

The next enquiry is, can she claim dower in the other parcels of land?

These consist of real estate, of which the father of her husband died seized, in fee, during the coverture, and which descended to the latter, and the other children of the deceased.

It is admitted by the parties, that upon an application to the county court for a division of the estate, and a report by the commissioners, that it was incapable of division; a sale of the land, by the ccmmissioners, was ordered, and at that sale the husband of the defendant in error, became the purchaser, and gave bonds to the other heirs for their proportion of the purchase money; that these proceedings were confirmed, and the bonds approved of by the court; that the purchase money was unpaid when the purchaser applied for the benefit of the insolvent law, as before stated: the lands were afterwards sold by the trustee, and for a sum not more than sufficient to pay the other heirs, and a claim against the estate of the deceased for which these lands were answerable; that the husband, after he became the purchaser, was put in possession of the land, and held possession of the same, until he applied for the benefit of the insolvent law, but never obtained a conveyance.

This land having been sold to pay the money due to the other heirs, who had a lien on it, the widow, it is the opinion of the court, acquired no title to dower by reason of the purchase.

DECREE REVERSED AND BILL DISMISSED WITH COSTS.

David Barr, Garnishee of Alfred Cline, *vs.* Charles M. Perry.—*December* 1845.

Under the act of 1795, ch. 56, a citizen of *Maryland* is authorised to proceed, by attachment, against any person *bona fide* indebted to him, who is not a citizen of this State, and doth not reside therein. It also prescribes the form of proceeding.

The garnishee, in an attachment cause, may plead in bar, that at time of issuing the attachment, the alleged debtor was a citizen of the State, and residing therein; the non-residence of the debtor in this case, was as essential as his indebtedness.

The plaintiff in an attachment cause cannot, by his affidavit, conclude the garnishee, upon the question of jurisdiction in the court. He may deny, by plea, the truth of facts essential in such affidavit, and thus show the court had not jurisdiction rightfully.

Under the act of 1715, no attachment can issue against a resident defendant, until a second *capias* shall have been returned *non est*.

It has been repeatedly decided, that if the affidavit of the creditor is in any respect defective, its defects may be relied on in any stage of the proceedings.

The necessity of an averment in the affidavit, of the citizenship of the plaintiff, is now done away with by the act of 1834; but whether it be there stated or not, that act requires the plaintiff, at the time of trial, to prove his citizenship.

The affidavit is indispensable, in order to give to a magistrate authority to order an attachment by the clerk of the county court, but when the court gives judgment, it must be because there is legal proof, that the debtor, in the language of the act, is not a citizen of the State, and not residing therein.

At some stage of the proceedings, and in some form or other, the garnishee must have the power of denying the truth of the matters charged in the affidavit.

The design of the attachment law is, as well to protect our own citizens while within the reach of the State's process, against any such summary proceeding, as to give the citizens of the *United States* a remedy against debtors, whose persons are out of the reach of our process, but who have property within our territory and jurisdiction.

The plaintiff in attachment need not file a declaration. The plea of the garnishee is to the writ of attachment, and the business of the plea is, to show why the attachment should be quashed.

By the acts of 1832, ch. 280; 1834, ch. 79; and 1839, ch. 39, there is a departure from what has been called the theory of our attachment laws.

Originally, the simple object of an attachment was, to compel the debtor to give bail, and appear to the ordinary suit, and that object being accomplished, the attachment was necessarily dissolved.

The design of the later laws was to continue to the creditor, who has been obliged to have recourse to this process, the lien, which, by the service of the attachment, he had on the property attached, unless the debtor will give other and better security than that which is afforded by giving bail.

Bail may be given, and at any time might be discharged, by surrendering the principal, and thus the creditor might be deprived of his lien, and have no security for his debt.

The law now leaves the non-resident debtor still at liberty, by giving bail to get the control of the suit, but forbids the dissolution of the attachment, unless bond, with approved security, is offered.

But, these laws relate to non-resident debtors, and must be confined to them: they do not relate to abuse or misuse of the process of the court, and must not be construed to apply to suits against residents.

The act of 1834, ch. 79, is confined to debtors non-resident of the State.

The act of 1839, ch. 39, extends the provisions of the act of 1834. It includes absconding debtors, and is for the benefit of a plaintiff, or plaintiffs, one of whom resided within the State; and, moreover requires, that the defendant, or some one of the defendants, should have been a citizen of the State, at the time when the contract was made, or the debt or damages accrued, upon which an an attachment may issue.

If the plaintiff intended to avail himself of the act of 1839, in answer to the plea of the garnishee in this case, he should have made it the subject of a replication.

Where an attachment was granted to compel an appearance, on the ground, among others, that the defendant was a non-resident, and he was arrested, appeared, and gave bail to the action, this does not dissolve the attachment as formerly. Both cases will be in court, viz: that against the defendant, as well as that against the garnishee. The defendant will get the conduct of his own suit. The plaintiff may get judgment in both. The proper course will be to delay the trial of the attachment, until a trial is had against the debtor defendant.

The court is not precluded, by these later acts, from ascertaining the truth, and giving the alleged debtor relief, if his property has been wrongfully seized.

The decision of the county court, permitting the garnishee in an attachment cause, to file pleas in bar, and to the merits, is not the subject matter of an appeal.

APPEAL from *Washington* county court

This was an *attachment*, sued out on the 14th January 1843, upon two promissory notes of *Alfred Cline*, payable to the appellee, and upon an account for money, lent to said *Cline* by him. The affidavit declared, that "*Charles M. Perry* did also make oath, that he is credibly informed, and verily believes, that the said *Alfred Cline* is not a citizen of the State of *Maryland*, and doth not reside therein."

An attachment was awarded and issued, and returned, "levied upon the credits of *Cline*, in the hands of the appellant, to amount of," &c.

The garnishee appeared, and pleaded:—

1st. *Non assumpsit* by *A. C.*

2nd. *Nulla bona* of *A. C.* in his hands.

3rd. That at the time of issuing and suing forth the writ of attachment in this case, he, the said *Alfred Cline*, was a citizen of this State, and resided therein, &c.

4th. That at the time of the date, and issuing of the writ of attachment in this case, against the said *Alfred Cline*, to wit, on the 14th day of January 1843, and for a long time immediately before the issuing and suing forth said writ of attachment, the said *Alfred Cline* was a citizen of the State of *Maryland*, and resided therein; and that the said *Alfred Cline* was taken by the sheriff of *Washington* county, under and by virtue of the writ of *capias ad respondendum*, which issued on the 14th day of January 1843, with the said writ of attachment against him, the said *Alfred Cline*, and to the said sheriff directed, and the said *Alfred Cline*, being so in the custody of the sheriff of *Washington* county, and under and by virtue of said writ of *capias*, appeared in the *Washington* county court to said writ or action, and gave and entered special bail to said action, and this the said garnishee is ready to verify, wherefore, &c.

5th. That the said *Alfred Cline* was arrested and taken by the sheriff of *Washington* county, under and by virtue of the writ of *capias ad respondendum*, which issued on the 14th day of January 1843, with the said attachment in this case, against the said *Alfred Cline*, and to the said sheriff of *Washington* county directed; and the said *Alfred Cline* being so in the custody of the said sheriff, by virtue of the said arrest, under and by virtue of the said writ of *capias*, appeared in the *Washington* county court, where said action was pending, and to which court said writ of *capias* was made returnable, and thereto obtained his release and discharge from the custody of the sheriff, aforesaid, gave special bail to said action, and this the said garnishee is ready to verify, wherefore, &c.

Issues were made upon the 1st and 2nd pleas, and the plaintiff demurred generally to the 3rd, 4th and 5th pleas in bar, and there was a joinder in demurrer. The county court, (T. BUCHANAN, A. J.,) sustained the demurrers, and awarded judgment of condemnation of the credits of *A. Cline*, upon those pleas.

EXCEPTION. At the trial of this cause, the defendant offered to file the following pleas, before mentioned, which were set out at length in the exception.

The plaintiff objected to right of the defendant, *David Barr*, to plead the matters contained in the said pleas, by reason of an agreement made between the counsel of the parties in the principal suit, *without the privity or consent of the said garnishee*, at the November term last of this court, which is in the words and figures following, viz :—

"It is agreed, by and between the counsel of record in the above cases, (there being various garnishees, and a case against each docketted,) and whose names are signed to this agreement, both for the plaintiff and the defendant, with the assent and authority for that purpose, given to the said counsel by the plaintiff and defendant in said cases, that the said cases shall be entered continued to the next court, on the following terms, to wit: Should not the full amount of the plaintiff's claim in said cases, as evidenced by the promissory notes of said *Alfred Cline*, filed in said cases, and all costs of said cases be paid to the said plaintiff, or his attorneys, or otherwise satisfactorily arranged with said plaintiff, or his attorneys, by the first day of the next March term of said court, then, and in that event, judgment of condemnation shall be entered by said court, condemning the property attached for the payment of said claim of the plaintiff, and all costs. It is also further agreed and understood, by and between said parties, acting by their counsel aforesaid, that the said claim of said *Perry*, shall be in no way reduced by any set off or discount, to be urged or pleaded by said *Alfred Cline*, except what may be admitted by said plaintiff, or his attorneys. And it is further agreed, that the said *Alfred Cline* shall, at the next term of said court, interpose no difficulty whatever, or obstacle, to a judgment of con-

demnation against the property and credits attached, by virtue of the attachment issued in said case, to the amount of the said claim of said *Perry*. It is also agreed, that the said *Perry* waives all claim for the money, charged as loaned, in the statement and affidavit filed in said cause, and any other claim, except what arises from said notes."

The plaintiff, upon the reading of this agreement, prayed the court to reject the said pleas, except the plea of *nulla bona*, upon the ground, that all the other pleas were offered by the garnishee on behalf of the said *Alfred Cline*, the principal defendant, who, by his said agreement, had precluded himself from filing the said pleas. But the court, (T. Buchanan, A. J.,) overruled the said objection, and permitted the said garnishee to file the said pleas. The plaintiff excepted.

The garnishee prosecuted this appeal.

The cause was argued before Archer, C. J., Dorsey, Chambers, Magruder and Martin, J.

By Palmer and McMahon for the appellant, and
By George Schley and W. Price for the appellees.

Magruder, J., delivered the opinion of this court.

In deciding the questions which arise in this case, it is to be assumed, that the defendant in error, is a citizen of *Maryland*, Being so, the act of Assembly, 1795, ch. 56, authorises him to proceed, by attachment, against any person *bona fide* indebted to him, who is not a citizen of the State, and doth not reside therein. It also prescribes the form of proceeding.

The affidavit upon which the attachment in this case was issued, states, that the defendant in error, is credibly informed, and verily believes, "that his debtor, *A. Cline*, is not a citizen of the State, and does not reside therein." The attachment was laid in the hands of the plaintiff in error, who appeared to show cause why the property of this debtor, which was according to the return of the sheriff, in his hands, should not be condemned. With other pleas, the garnishee pleaded, that at the time of the issuing of the attachment, the alleged debtor

was a citizen of the State, and residing therein. To this plea the defendant in error, put in a general demurrer, which was sustained by the court, and the first question is, whether there be not error in this?

To warrant the proceeding by attachment in this case, the non-residence of the debtor, is as essential as his indebtedness. It was because he was alleged to be a non-resident, that the defendant in error, was enabled to obtain the attachment. If, then, it be true, as the garnishee in this plea alleges, that the debtor was a citizen of the State, and residing therein when the attachment was issued, then the proceeding was *in fraudem legis*. The demurrer to the plea admits, that the debtor was a citizen of the State, and residing therein when the attachment was issued. If so, it is a case in which the court below had no jurisdiction, unless the defendant in error, can give to it jurisdiction by his affidavit, admitted to be untrue in this respect.

It is insisted, however, that although the proceedings in this case be in violation of law, and although of this case, the court had not rightfully jurisdiction, yet, of this, the garnishee cannot avail himself. "Such a doctrine, (said a court of a sister State,) is attended with the most pernicious consequences. The parties who issued the process, are bound to support it, when it is attacked." 2 *Yeates*, 277. Such a doctrine is not easily to be reconciled with the law, as expounded by this court. "He, (the garnishee,) is a party to the attachment, and can, at all times, plead to it, and object to its illegality or irregularity." 10 *G. & J.*, 386. Such a doctrine, puts it in the power of a creditor to repeal, in effect, so much of the law of 1715, as declares, that no attachment shall issue against a defendant residing in the State, until a second writ shall have been returned *non est*, because if the pretended creditor chooses to swear, that he is "credibly informed, and verily believes his alleged debtor to be a non-resident, that non-residence could never afterwards be denied, either by the debtor himself, or by his garnishee, who is bound to protect the effects in his hands, until the law makes it his duty to surrender them to a stranger."

When, in the Supreme Court of *Vermont*, it was urged by counsel, that "the trustee, (garnishee,) is summoned, for the sole and only purpose of disclosing, whether or not he had in his hands the effects of the debtor," the court correctly replied, "as a general rule, and at common law, a man can have no legal proceedings taken against him, in relation to his debts and dealings, except by his creditor." This is a right and privilege of no inferior importance. That a man should be called into court, and there subjected to personal examination, upon oath, in relation to his debts and dealings with third persons; a proceeding which, even, those third persons could not themselves take, especially in a court of law, is not to be suffered, but in cases of imperative necessity, and by express and clear law. This statute clearly interferes with the common law rights of the trustee, (garnishee,) in many important particulars. It subjects him to the process of a stranger, with whom he has no privity. It calls him into court, when his creditor does not desire it. It subjects him to personal disclosure. 9 *Vermont Reports*, 273. See also 1*st Green's N. J. Reports*, 131, 250.

Surely, when an individual is subjected to all this, and is brought into court, to show cause why he should not pay the debt of another person, because to that person he may be indebted, he must have a right to show, that this proceeding, which is clearly in derogation of his common law rights, is a proceeding forbidden by the law; he must have a right to deny the existence of facts, which the statute, itself, declares must exist, in order to give jurisdiction to the court. Is it true, that here, although the supposed debtor of another person is not to be harrassed, and the property of debtors is not to be seized, but in cases of imperative necessity, yet, the creditor, himself, by swearing to that which is untrue, can produce those evils, and the law is powerless to afford relief to persons who are thus wronged and oppressed? The garnishee, we are told, is precluded from questioning the jurisdiction of the court, although its want of jurisdiction is admitted by the plaintiff; and the debtor certainly cannot, after he has appeared to the suit, in order to resist what he may deem to be an unjust demand, and to save his property from sacrifice.

It has been repeatedly decided by this court, that if the affidavit of the creditor is in any respect defective, its defects may be relied on in any stage of the proceedings. See 6 *H. & J.*, 446. 5 *H & J.*, 133. Surely, the motion to quash the attachment, may be made by the garnishee, as well as by any other person, and when he makes these objections, and directs the attention of the court to any defect in the proceedings, is he not showing cause why the goods of the debtor, in his hands, shall not be wrested from him, to pay the supposed debt on which the attachment is issued? He may then show cause, even although he has effects of the debtor in his hands.

But, in this case, the objection is not to the form of the affidavit. It does state the debtor to be a non-resident, and it is insisted, that the affidavit, in this respect, is not to be contradicted.

The creditor, then, is allowed to prove this all essential point, by swearing that he is credibly informed, and verily believes it to be true, although no disinterested witness would be allowed to state what he was credibly informed, and though he verily believed it to be true. Now, it would be difficult to prove, that so much of the affidavit as relates to the debtor, not being a citizen of the State, nor residing therein, is incontrovertible, and, yet, that the truth of the residue of the affidavit may be questioned. In the residue of the affidavit, he is required to speak positively; he is testifying to what he is required to know, not to what he believes to be true. Yet, it can scarcely be pretended, that the affidavit furnishes conclusive evidenee of the amount of indebtedness, or that the creditor is a citizen of one of the States, territories or districts.

In the case of *Dawson vs. Brown*, 12 *G. & J.*, 53, it was decided, that the creditor is not bound to produce before the judge or justice, all the written evidence which may be in his possession, and which might be used before the jury, to establish the debt, and entitle him to a condemnation of the property attached. The affidavit, then, so far as it relates to the amount of indebtedness, or would prove any indebtedness, is not conclusive, and why should that part of it, in which the creditor swears, touching what he does not pretend that he knew, be

treated, as would be a record, against which there can be no averment?

It is unnecessary here, to collect the various cases in which, in the trial of the attachment, (the creditor against the garnishee,) the creditor was defeated, because he omitted to prove to the jury, that he was a citizen of the State, district or territory, of which he professes to be a citizen. See the case, *Mandeville vs. Jarret*, 6 *H. & J.*, 497; and also, see 6 *G. & J.*, 243. The want of such an averment in the affidavit, is now rendered unnecessary, by the act of 1834, ch. 79, but whether it be stated in the affidavit or not, that act of Assembly requires him, at the time of trial, to prove his citizenship. Now, why is it, that this court has so often decided, that on the plea of *non assumpsit*, simply, the verdict of the jury must be for the defendant, unless the plaintiff proves, that at the time of the issuing the attachment, he was a citizen of one of our States, territories or districts? Is it not to entitle him, by judgment of the court, to a condemnation of the property attached upon the simple finding of the jury, that a third person, not before the court, is indebted to the plaintiff the ascertained amount? Must it not be, that to entitle him to a judgment against the garnishee, he must prove to the jury, not simply the amount of another person's indebtedness, but a right, in the attachment case, to recover judgment?

The affidavit of the creditor is not required, in order to furnish him at the time of the trial, with proof of his claim, or of the citizenship of the plaintiff, or of the non-residence of the debtor. This affidavit, stating in connection with other matters, the non-residence of the debtor, is indispensable, in order to give to the magistrate authority to order the attachment, but when the court gives judgment, it must be because there is legal proof, that the debtor is, (not *believed* to be, but *is*,) in the language of the act, not a citizen of the State, and not residing therein.

How can the garnishee, at all times, object to the illegality, as well as irregularity of the attachment, (as is said in 10 *G. & J.*, 286,) but by denying, or putting the creditor to the proof, by legal testimony, of his own citizenship, the indebtedness

alleged, and the non-residence of the debtor? The argument about the affidavit, and its conclusiveness to establish all or any of the facts stated in it, might be urged with equal success, to prove, that if the creditor makes the affidavit required by another (the 5th,) clause of the act of 1795, the garnishee would no longer be at liberty to insist, that he had no effects in his hands.

At some stage of the proceedings, in some form or other, the garnishee, (having a right to object at all times to its illegality, as well as irregularity,) must have the power of denying the truth of the matters charged in the affidavit. The law would, otherwise, defeat one of its manifest objects. Its obvious design is, as well to protect our own citizens, while within the reach of its process, against any such summary proceeding, as to give to citizens of the *United States*, a remedy against debtors, whose persons are out of the reach of its process, but who have property within its territory or jurisdiction.

The question, then, would seem to be, whether the defendant had a right to make the objection to the plaintiff's recovery, in the manner he did? It may be said, that such a plea is unnecessary, because the plea of *non assumpsit* would have answered. In the first place, it may be remarked, that upon the strict rules of law, the plaintiff has no right to insist. He has filed no declaration, and need not to file one. Whether filed or not, the plea is and must be to the writ, 4 *H. & J.*, 185; and the business of the plea is, to show why the attachment should be quashed. Why condemnation should not be had of the goods and chattels, &c., in the hands of the garnishee. If the plea sets forth anything, which, if true, proves that the attachment was not legally issued, it is a full and complete defence.

It may be said, that it amounts to the general issue. We are told, that when the defence consists of matters of law, it may be pleaded specially, though it may be admitted in evidence, under the general issue. A release, coverture, infancy, or payment, may be pleaded specially in *assumpsit;* though any of these matters may be given in evidence, under the plea of *non assumpsit*. But, even if it was not strictly admissible, it is a

defect in form merely, and can be taken advantage of only on special demurrer. *Archbold on Pleading*, 196.

This plea seems to be authorized by the *Vermont* case, already referred to, and a case in 5 *Connect. Reports*, 118, with which, also, we have been furnished by the counsel for the plaintiff in error.

But, what ground is there for this objection? In *Campbell vs. Morris*, 3 *H. & McH.*, 552, *Judge Chase* said, that the attachment, until dissolved by bail and appearance, is a summary process, and while its nature remains unchanged, every fact is cognizable by the court, which will not only quash it for any irregularity, or, (speaking with reference to the case before him,) "which will show, that the property attached, does not belong to the defendant, and evidence, *dehors* or extrinsic, to the proceeding, may be resorted to, in order to prove the want of title to the property attached."

If proof of that fact was admissible, surely proof of any other fact, which shows that the plaintiff has been guilty of an abuse of this summary process, that he obtained the order for the attachment, by falsehood and fraud, cannot be rejected.

In the same case, (553,) speaking of a fact alleged to exist in the case, to wit, that *Robert Morris* is a citizen of *Pennsylvania*, he added "the court are of opinion, that proof of that fact can be received on the attachment."

Judge Chase was of the opinion, that the proof was to be made to the court, because the proceeding is summary, and without the intervention of a jury. Now, if in this latter respect, the practice had not undergone some change; if the proof was to be offered to the court, yet this plea proposes to prove that fact, and in this summary, irregular proceeding, the suggestion may be made to the court, in the form of a plea, as well as of a motion. It was stated, that the alleged non-resident debtor, was, in truth, a citizen, and the fact was admitted by the plaintiff. If the question was to be decided by the court, then the case was ready for its decision.

But, the truth is, that courts of more modern times, have not been so partial to the old practice of trying facts, without the intervention of a jury, even in these summary proceedings.

The several cases of *South Carolina*, which have been cited, seemed to have turned principally on the question, not whether the fact was triable at all, but whether it was proper for the court to try it. One of the judges observed, of the old practice, "a short hand method of quashing by motion, a remedy given by law, would place in the hands of the court a dangerous power. An attachment can only be considered in the light of a suit or action of law, and like all other legal remedies, its want of propriety or efficacy, must be made to appear in a regular course of proceeding." (2 *Nott & McCord's Reports*, 132.) And in the latest decision in that State, to which we have been referred, (2*nd Hill's Reports*, 631,) upon affidavit, that the defendant was within the State at the time the attachment was levied, it was set aside, "although," said the judge, "in a case where the fact was doubtful, the court would not interfere." This is the doctrine of a State, which is accustomed to require the creditor, in order to obtain an attachment, to give bond, to be answerable for the damages which the defendant may sustain, by any illegal conduct, in obtaining such attachment.

In *Maryland*, it ought not to be doubted, that these facts, if disputed, may be submitted to a jury, and, therefore, may be pleaded. The court cannot sustain this demurrer, without reversing much that is now considered settled law in this State.

A demurrer was filed to a plea, in which the plaintiff in error, after alleging, that the debtor was a citizen of *Maryland*, at the time of the issuing of the attachment, proceeds, "and he, the said *A. Cline*, was taken by the sheriff of *Washington* county, under and by virtue of the writ of *capias ad respondendum*, which issued, with the writ of attachment, to said sheriff directed, and the said *A. Cline* being in custody of the sheriff, under the said writ of *capias ad respondendum*, appeared in *Washington* county court, and gave bail."

If this be true, and so the demurrer admits, then, according to the old decisions, the attachment was dissolved, even although it was regularly and properly issued against a debtor, who at the time was a non-resident. Of course, the garnishee in this plea, shows cause why the writ should be dissolved. But the

old law has undergone some change. Besides the act of 1832, ch. 280, with which at present, we have no concern, we have the acts of 1834, ch. 79, and 1839, ch. 39, which it is insisted, require a bond in this case, before the attachment can be dissolved.

It is obvious, that in these acts of Assembly, there is a departure from what has been called the theory of our attachment laws. Originally, the simple object was to compel the debtor to give bail, and appear to the ordinary suit, and that object being accomplished, the attachment was necessarily dissolved. The design of these last mentioned laws, was to continue to the creditor, who has been obliged to have recourse to this process, the lien, which, by the service of the attachment, he had on the property attached, unless the debtor will give other and better security than that which is afforded by giving bail. Bail may be given, and at any time may be discharged, by surrendering the principal, and thus the creditor may be deprived of his lien, and have no security for his debt. Hence, the law leaves the non-resident debtor still at liberty, by giving bail, to get the control of the suit, but forbids the dissolution of the attachment, unless bond, with approved security, is offered. But, these laws relate to attachments against non-resident debtors; (the act of 1839, includes absconding debtors,) and must be confined to them. They do not relate to cases in which there has been an abuse or misuse of the process of the court. They must not be construed to apply to suits against residents, and unless "the court can superintend and control the writ, by keeping it within the design and intent of the act, it becomes an engine of great oppression and abuse."

The act of 1834, unquestionably, does not embrace the case before us. It is confined in its provisions to debtors, not resident in the State, and the plaintiff, in this case, by demurring to the plea, admits, that the debtor resided in the State at the time the attachment was issued.

The act of 1839 extends the provisions of the act of 1834. The former law, however, is for the benefit of a plaintiff or plaintiffs, one of whom resided within the State, and moreover requires that the defendant, or some one of the defendants,

should have been a citizen of the State, at the time when the contract was made, or the debt or damages accrued.

If the plaintiff, in this cause, intended to avail himself of the provisions of this law, he should, in a replication, have brought himself within them.

The last demurrer requires us to assume, that the debtor was a non-resident; and if so, the statute says, the attachment shall not be dissolved unless the defendant gives bond, with good security. The circumstance, that he has given bail and appeared, does not dissolve an attachment issued against a non-resident. The law had been so, but thus far is altered by the legislature; he has still a right to give bail and appear, and thereby get the conduct of his own suit; but if he be a non-resident, the bail and appearance will no longer dissolve the attachment. Both cases will be in court. The plaintiff may get judgment in both, and the proper course will be to delay the trial of the attachment, until a trial is had in the other case.

The court, then, is not precluded from ascertaining the truth, and giving the alleged debtor relief, if his property has been wrongfully seized.

The affidavit is not conclusive. The fact of non-residence may be enquired into. The great purposes of the act, said the Supreme Court of *New Jersey*, in the case 1*st Green*, 134, are, by seizing the property of a debtor, to compel his appearance, to answer the demand of the plaintiff; when from non-residence or flight, he is beyond the process of our judicial tribunals, and on his failure of appearance, to apply such property to the just end of satisfying his debts. An attachment is an extraordinary, not an ordinary writ. To use it when the debtor is within the reach of ordinary process, is wholly inconsistent with the spirit and design of this mode of procedure.

We should not be disposed to say, that the court below acted wrong in receiving the pleas, but from such a decision it is not the right of a party to appeal to this court.

1st and 2nd demurrer overruled, and judgment reversed; 3rd demurrer and exception affirmed, and

JUDGMENT FOR THE APPELLANT, WITH COSTS.

DAVID CHANEY AND WIFE, *vs.* WILLIAM TIPTON AND WIFE, AND OTHERS.—*December* 1845.

Upon a bill filed by husband and wife, against the co-heirs of the wife, to procure the division or sale of their father's real estate, of which he died seized and intestate, the fact, that one of the co-heirs, defendants, had purchased the wife's interest from her husband, and also the interest of the other heirs, no conveyance having been procured from the wife, in the mode prescribed by law, to pass the real estate of the *feme covert*, will not prevent the county court from issuing a commission, and directing and allowing an election to be made by the parties entitled, according to the act regulating descents.

After an election is made, and the bonds for the purchase money are about to be given; or if the election shall be refused, when the proceeds of sale are about to be distributed, the court will take into consideration the rights of the purchaser, and adjust the details of the transaction accordingly.

The rights of the purchaser, and the means of securing his interest, must be determined by the nature of the interest acquired by him.

Under the act to direct descents, the alienee of an heir, in the cases therein provided for, is authorized to stand in the place of his vendor, as to the right of election or distribution.

If his interest or claim be such as a court of equity will specifically enforce, the remedy must be sought by the proper process of the Chancery court: for any other contract in relation to land, the ordinary remedies at law, or in equity, as the case may require, will be open to the party entitled.

APPEAL from the Equity side of *Allegany* county court.

This cause was before the court in 1840, and is reported in 11 *G. & J.*, 253, and then remanded for further proceedings.

In an amended bill, the appellants alleged, that *Susannah Chaney* is one of the heirs at law of *Thomas Stallings*, deceased and intestate, leaving at the time of his death the following children and heirs at law, besides the said *Susannah*, viz: *Mary*, wife of *William Tipton*, *Lloyd Stallings*, *Elizabeth*, wife of *Samuel North*, all of full age; that at the time of his death, the said *Thomas* was seized of a large real estate, and that his heirs cannot agree among themselves as to the division thereof. Prayer for a commission under the act to direct descents, and proceed according to its provisions to divide the estate, &c.

A commission was thereupon ordered by the court 15th May 1841, and issued on the 11th August following. The commissioner's return, stated, they had determined that the estate of the deceased could not be divided, without loss to the parties interested therein, as named in the commission, and valued the estate at $5,580.50.

On the 13th May 1842, the court, (BUCHANAN, A. J.,) ordered, that the report and return of the commissioners be confirmed; that the several parties, entitled to their election under the act of 1820, ch. 191, and its supplements, be and appear in this court on the 2nd day of the next October term of this court, to exercise and determine their respective rights of election, provided that the confirmation of the report of the commissioners by the court, and the election of any of the parties to take the property at the valuation of the commissioners, or their refusal to take it at said valuation, shall not prejudice the defendants, nor be of any avail to the complainants, if the court shall, on the final hearing, be of opinion, that the complainant is not entitled to the relief sought by the bill; the object of this order being only to facilitate the proceedings, and bring the cause to a final issue, with as little delay as possible.

Nothing being done under the order of May 1842, the cause at October term 1842, was ordered to set down for final hearing at the next term.

At May term 1843, the county court, (BUCHANAN, A. J.) decreed:—

The bill seeks for a sale of the real estate of *Thomas Stallings*, deceased, in order that the proceeds thereof may be distributed among his heirs at law, of whom *Mrs. Chaney*, the wife of *David Chaney*, is one; which is resisted by *Lloyd Stallings*, one of the defendants, on the ground, that before the institution of the suit, he, the defendant, purchased of the complainants all their interest in the estate of the said *Thomas Stallings*, their father, and that, therefore, they have no right to call for a sale of the estate.

The contract for a sale of the interest in the estate of *T. S.*, and proof of the payment of part of the purchase money by *L. S.*, may be seen by looking into the proceedings, and need not

here be more particularly referred to. It may be admitted, that the contract or agreement entered into by *Chaney and wife* with *L. S*, on the 26th April 1830, was void as it respects *Mrs. Chaney*. Yet it by no means follows, that it was not a binding contract in regard to *C.*, himself, who was competent to contract for the sale of their interest in the estate of *T. S.* which decended to his children, as stated in the complainant's bill. The reason why the contract was void in regard to *Mrs. C.*, is, that she was a *feme covert*, who, in contemplation of law, could make no binding contract, and whose contracts consequently, are considered, both at law and in equity, as void and inoperative, and such as will not be enforced against her; but the husband has no such privilege, and although he can make no contract which can bind the wife's estate, unless it be by deed, duly executed and acknowledged, pursuant to the provisions of the act of Assembly, in such cases made and provided, yet he may make a contract for the sale of his wife's real estate, which would be binding on himself, and which the law would enforce against him.

In this case, *C. and wife* agreed to sell her interest in her father's estate to the defendant, *L. S.*, who paid them about $500, part of the purchase money, and yet *C.* is prosecuting a bill for the sale of *T. S's* real estate, for the sale of which to the defendant, *L. S.*, he has paid him about $500, as before remarked; now, although this payment cannot affect *Mrs. C's* right or title to the land in question, in case she should survive her husband, yet her husband cannot be permitted to sustain such a suit in the face of his agreement, under the circumstances of the case.

If such a claim should be sustained, would it not be to allow him to keep his wife's estate, and also the purchase money, which the defendant has paid for it, and would not such a state of things be abhorrent to justice?

If *C. and wife* are entitled to the land, notwithstanding the agreement and payment aforesaid, let them prosecute their suit at law, where, perhaps, they may be entitled to recover the possession of the land, the legal title to it not having been conveyed by them to the defendant. But, this is an application

to equity, and if the claim is in violation of equity and justice, how can it receive the sanction of this court? To get over this difficulty, the complainants contend, that the defendant failed to make his payments punctually at the times specified, and that, consequently, the contract ought not to be enforced against them, as time was made an essential part of the contract, and was an inducement with them to make it. Now, suppose this to be the true construction of the agreement, and that the court would not enforce it against the complainants, after the failure of the defendant to make the payments at the periods fixed upon by the contract, still it does not follow, that the complainants are entitled to recover in this case. What if the payments had been punctually made by the defendant, could the complainant, in that case, be entitled to the decree of this court? and yet it is apparent, that in such case, the rights of *Mrs. C.* would not be affected by it; and in the event of her surviving her husband, she would be entitled to recover, because the agreement, although binding on her husband, was, nevertheless, void as to her. But the defendant did not pay the whole of the purchase money, agreeably to the stipulations of the contract. He paid only part of it, say about $500, which the complainant, *David Chaney*, received, and still retains; and surely, if he could not claim a decision of this court for a sale of the land, in case the whole of the purchase money had been paid, because it would be iniquitous to sustain such a claim, it follows, that he is equally precluded, on principles of justice, from recovering under the circumstances of the case, whilst he retains the $500 which have been paid him. Shall he be permitted to affirm and disaffirm his contract, *uno flatu*? Even at law, such a proceeding could not be tolerated, much less in this court.

If *C.* contends, that the failure of the defendant to pay the purchase money at the times stipulated, released him from the obligation of the contract, and that he was no longer bound by it, he ought to have refunded, or at least offered to refund, what had been paid by the defendant on the contract. He has, however, done no such thing. He retains the payment made to him, and seeks to recover the whole of the land, as if

no payment had been made to him. Now, is this just or equitable?

On a sale at law, the vendee, if he claims to rescind the contract, must restore, or, at least offer to restore, the articles purchased, before he can resist the claim of the vendor. The vendee will not be permitted to retain the things purchased, and at the same time defeat the vendor of the purchase money; and the converse of the proposition holds equally good. A vendor who has received part of the purchase money from the vendee, cannot rescind the contract of sale for any supposed default of the vendee, in not complying with the terms of sale, unless he shall have refunded, or, at least, offered to refund the payments made to him, and thereby put the vendee in the condition he was in when the contract was made. If such be the rule at law, how much stronger is it in equity, where the court professes to act on equitable principles, and whose decisions ought to have the sanction of equity and justice. Here, the defendant paid *C.* about $200 in cash, and gave him a negro woman, valued at $300, in all about $500, in part payment of the land. The negro woman *C.*, sold for $500, and he retains the whole, and has not refunded, nor offered to refund a cent of it before the institution of the suit. What if the defendant had paid the whole of the purchase money, *Mrs. C.* would not have been any more bound by it than she is at present; but could her husband, in such case, be permitted to sustain a bill in equity, against his own contract for a sale of the land? To sustain such a proceeding would be, to countenance dishonesty and fraud, which could not be tolerated in any court of justice. Now, if *Chaney* had a right to rescind the contract, because it was not punctually fulfilled by the defendant, surely he ought not to withhold what the defendant had paid on the contract; but before the institution of the suit, it was his duty to have refunded, or, at least, offered to refund what had been paid him. This would have been honest and just between the parties, and had he done so, would have removed the barrier, which now exists, to the relief prayed by the bill. The complainants come into court, and ask its interposition in their favor, but before the court will interpose, it

will take care that injustice is not done to the defendant. Let them do justice to him before they ask for a decree against him. This court, in doing justice to the complainants, will not be unjust to the defendant. The dismissal of the bill, will not impair the rights of *Mrs. C.*, but prevent her husband from doing injustice to the defendant. She may, if she survives her husband, recover her portion of her father's estate, and her heirs at law may do the same. By marriage, a husband gains a title to the rents and profits of his wife's real estate during the continuance of the coverture, except where he becomes tenant by the curtesy, in which latter case, he acquires a title to her estate during his life, 2 *Bl. Comm.*, 434; and chancery will not interfere with the marital rights of the husband over his wife's real estate, so long as he maintains her to the best of his ability, they living together. *Vaughan vs. Buck*, 7 *Jurist*, 388, *July No. of the Law Lib.*, 237.

In regard to *C.*, then, it was *quasi*, a sale of his own estate, for although the fee was in the wife, yet the property was his during the coverture; and if he could not vacate the sale of his own estate, without a repayment or tender of what had been paid by *Stallings*, on the purchase of it, neither can he in this case, for he was competent to sell it during the coverture, and if he could not vacate the sale of his own estate, without a repayment or tender of what had been paid by *Stallings*, on the purchase of it, neither can he in this case, for he was competent to sell it during the coverture, and the purchaser had a right to hold it for that period, with which right, equity will not interfere. The property was liable to be sold for *C's* debts, and if it had been sold under a *fi. fa.* against him, the purchaser could not be rightfully disturbed by *Chaney and wife* during the coverture. For these and other reasons that might be suggested, the court is of opinion, that the bill cannot be sustained.

On the 26th day of April 1837, this court dismissed the bill in this case, from which there was an appeal to the Court of Appeals, which remanded the cause to this court, with instructions, that the bill should be amended, so as to make it an application to the court for a sale or division of the land, under

the law of descents. This has been done, and other proceedings had, as will appear by the record. It is contended by the complainants, that the decree of the Court of Appeals is conclusive of their right to recover, and that this court has nothing left to it but to carry the decree into effect. If this court thought that the Court of Appeals intended to decide, definitively, the rights of the parties, there would not be a moments hesitation on our part to act in conformity to the views of the superior tribunal, whatever might be our own impression of the subject; we know it would be our duty to do so, and it would be always highly gratifying to us to have the instructions of that high tribunal as our guide, in deciding controversies before us; so far, however, from deciding on the merits of the case, the Court of Appeals emphatically say, "that the substantial merits of the cause will not be determined by the reversing or affirming the decree of *Allegany* county court, setting as a court of equity, and that the purpose of justice will be advanced by remanding the said cause for further proceedings." The Court of Appeals, then, did not decide the cause on its merits, but decided, that the complainants had misconceived their case, and remanded it under the provisions of the act of 1832, ch. 320, to this court, for the purpose of amending the pleadings, and causing such other proceeding to be had, under the direction of this court, as should be necessary for determining the cause upon its merits.

On the 12th day of October 1844, decreed, that the complainant's bill be dismissed, with costs.

From this decree the complainants appealed to this court.

The cause was argued before Archer, C. J., Dorsey, Chambers, Magruder and Martin, J.

By Pigman and McMahon for the appellants, and
By W. Price for the appellees.

Chambers, J., delivered the opinion of this court.

The material questions in this case are concluded by the opinion of this court, on the former appeal, and reported in 11 *G. & J.*, 255. We adhere to the opinion there expressed.

In pursuance to the mandate of this court, the bill and proceedings have been amended in the court below; and we think that court erred, in not proceeding with the case, in obedience to the acts of Assembly regulating descents, by directing and allowing the election to be made by the parties entitled, according to the provisions of those acts.

The contract of sale, alleged to have been made by *Chaney*, ought not to defeat the proceeding.

The estate descended, amongst others, to *Mrs. Chaney*, the wife, and no contract made by her husband alone, or even with her consent and concurrence, unless in the mode prescribed by law to pass the real estate of a *feme covert*, could divest her of that estate.

It is in virtue of her estate, as one of the heirs at law, that this proceeding has been instituted, and the contract of the husband to sell her interest, or his own, was not a sufficient reason on which to dismiss it.

The effect, in other respects, of such a contract, and of payments made to the husband in virtue of it, as well as other matters alluded to and discussed in the argument, are not now properly for review in this court, which has not the duty of adjusting the details; the predicament of the case not being such as to make this adjustment, at this time, practicable, but will be proper for consideration when the election shall be made, and the bonds are about to be given; or if the election shall be refused, when the proceeds of sale shall be distributed.

If *Stallings*, one of the appellees, has acquired the interest of other co-heirs, as is alleged, the means of securing that interest must be determined by the nature of the interest acquired.

The acts of Assembly referred to, authorise the alienee of an heir, in the cases therein provided for, to stand in the place of the vendor, as to the right of election or distribution. If the interest or claim be such as a court of equity will specifically enforce, the remedy must be sought by the proper process of the Chancery court. For any other contract in relation to the land, the ordinary remedies at law, or in equity, as the case may require, will be open to the party entitled. The court will sign a decree, reversing the decree of the court below, and

remanding the case, to be proceeded in according to the views above expressed.

DECREE REVERSED AND CAUSE REMANDED.

DORSEY, J., dissented.

STATE OF MARYLAND, USE OF HENRY FIREY *vs.* SAMUEL MILLER.—*December* 1845.

The principal in a guardian's bond called on *V*, and asked him to become one of his sureties in such bond, and stated at the same time, that the defendant would become the other surety. The minutes of the Orphans court showed, that the court would approve, as sureties, the defendant and *J*; and on the face of said minutes it appeared, that the name of *V* had been erased therefrom, and that of *J* substituted. HELD: there was no evidence that the defendant signed the bond, under the impression and with the understanding, that *V* was to be his co-surety; nor that the minutes were known to defendant; nor any misrepresentation made to him, as to the person who was to be his co-security.

It appeared on the face of a guardian's bond, that it was originally filed "— *day of December* 1823;" that the date was altered to "*the* 3*rd day of May* 1824;" that by the minutes of the Orphans court, and endorsement on the bond, it was received, endorsed, and placed upon record, the 3*rd May* 1824. HELD: that this alteration was wholly immaterial, and did not, in the least degree, tend to alter or enlarge the liability of the defendant.

The alteration of the date of a bond being, under the circumstances, wholly immaterial, and not made by the obligee, the plaintiff, its validity is in no manner affected by the defendant's, the obligor's failure to consent to such alteration.

By the act of 1798, ch. 101, sub. ch. 12, sec. 1, guardian's bonds are placed, in all respects, on the same footing with bonds given by executors and administrators; and by the act of 1829, ch. 24, sec. 1, limitations begin to run from the passing of such bonds.

Appeal from *Washington* county court.

This was an action of *debt*, brought on the 12th November 1841, by the appellant against the appellee, on the bond of *Joseph Firey*, *Samuel Miller*, and *Jacob Firey*, dated 3rd May 1824, conditioned, that *Joseph Firey* would perform the duty of guardian to his children, *Lewis* and *Henry*. The defendant, the appellee, appeared and pleaded *non est factum*, on

which issue was joined. The jury found a verdict for the defendant.

1st Exception. At the trial of this cause, the plaintiff offered in evidence to the jury, the writing obligatory declared on, which was witnessed by *John Wyant*, for *Samuel Miller*, and *George C. Smoot*.

The plaintiff, thereupon, further offered in evidence by *John Wyant*, a competent witness, who proved, that *Samuel Miller*, the defendant, sent for witness to see him, the said *Samuel Miller*, sign the said writing obligatory, and that the said witness did, accordingly, see the said defendant sign, seal, and execute said bond. The witness further said, that he heard nothing from the defendant, as to who was to be his co-surety.

The defendant then offered in evidence *Matthew S. Vanlear*, a competent witness, by whom the defendant proved, that *Joseph Firey*, the principal in the said writing obligatory, had called on witness, and asked him to become one of his sureties in the said writing obligatory, the said *Joseph Firey*, at the same time, stated to witness, that the defendant would become, or had become the other surety upon the bond; that the witness refused so to become, and stated, that the defendant was good and sufficient, and that he had better obtain his brother, *Jacob Firey;* that said *Jacob Firey* was worth nothing, and could, therefore, lose nothing.

The defendant then offered in evidence, the following minutes of the proceedings of the Orphans court of *Washington* county.

"On application, *Joseph Firey* is appointed guardian to *Henry Firey*, aged eight years 25th March last; to *Lewis Firey*, aged six years 6th January last. The court will approve of *Samuel Miller*, and *Jacob Firey*, securities. See bond, dated 3rd May 1824."

"True copy, Test,— James Wason, *Reg'r*"

From which it appeared, on the face of the said minutes and proceedings, that the name of *Matthew S. Vanlear* had been erased, and the name of *Jacob Firey* inserted in the place thereof.

The plaintiff then moved the court to instruct the jury, that there was no evidence from which the jury could infer, that

Matthew S. Vanlear becoming a co-surety with said defendant, was necessary to make the said instrument of writing obligatory on the part of the said defendant; which instruction and direction the court, (T. BUCHANAN and MARSHALL, A. J.,) refused to give; but were of opinion, and so instructed the jury, that if they found from all the testimony in the case, that if the said defendant signed and sealed said bond, under the impression and the understanding, that the said *Matthew S. Vanlear* was to be his co-surety, that thereby the said bond is not the deed of the said defendant. The plaintiff excepted.

2ND EXCEPTION. The plaintiff further moved the court to instruct the jury, that it was not competent for the said defendant to avoid the said writing obligatory, by shewing that the said *Joseph Firey*, the principal obligor in the bond, had practised any misrepresentations of fraud upon the said defendant, by which he was prevailed upon to become the co-surety on said bond, under the impression, that the said *Matthew S. Vanlear* was to become his co-surety, unless the said misrepresentations were known to or participated in by the said plaintiff; which instructions and directions the court refused to give, but were of opinion, and so instructed the jury, that if they found from all the testimony in the case, that if the said defendant signed and sealed said bond, under the impression, and with the understanding, that the said *Matthew S. Vanlear* was to be his co-surety, that thereby the said bond is not the deed of the said defendant. The plaintiff excepted.

3RD EXCEPTION. It appeared upon the face of the writing obligatory, that the word, "*December*," had been erased, and the word, "*May*," inserted in the place thereof; and that the word, "*three*," had been erased, and the word, "*four*," inserted in place thereof; making the date of said bond, "*the 3rd day of May* 1824," instead of "— *day of December* 1823." It also appeared by the minutes and proceedings of the Orphans court, and by the said endorsement upon the back of said bond, that the said bond was received in the Orphans court, endorsed and placed upon record, on the 3rd day of May 1824.

The plaintiff then prayed the court to instruct the jury, that there does not appear upon the face of said bond, any altera-

tion of the date thereof, which will avoid the instrument; which opinion and direction the court refused to give to the jury, but were of opinion, and so directed the jury, that if they believe that the alteration or erasure, above mentioned, was made after the said defendant executed said writing obligatory, that it avoided the same as to him. The plaintiff excepted.

4TH EXCEPTION. It also appeared upon the face of the said bond, that there had been no alteration or erasure of the day of the date of said bond; but it did appear, that the word, "*December*," and the word, "*three*," were erased, and the words, "*May*," and "*four*," inserted; and it also appeared, that the original entries upon the minutes and proceedings of the Orphans court, which has herein been referred to, were made on the 9th December 1823.

The plaintiff prayed the court to instruct the jury, that if they believed, that at the time of the execution of this bond by *Miller*, the place of the date thereof, either of the day, month, or year, was left blank, that the fact of filling up, or alteration of said date, to make it correspond with the time of the delivery of the bond, does not avoid said bond as to said *Miller;* which opinion and direction the court refused to give to the jury, but were of opinion, and so directed the jury, that if they believed that the alteration or erasure, above mentioned, was made after the said defendant executed said writing obligatory, and without his consent or authority, that it avoided the same as to him. The plaintiff excepted.

The State for the use, &c., prosecuted this appeal.

The cause was argued before ARCHER, C J., DORSEY, CHAMBERS, SPENCE and MARTIN, J.

By J. T. MASON for the appellant, and
By W. PRICE for the appellee.

ARCHER, C. J., delivered the opinion of this court.

We have carefully examined the evidence detailed in first and second bills of exception, and we perceive no evidence from which the jury could find, that the bond upon which the suit was brought was signed and sealed by the defendant, un-

der the impression, and with the understanding, that *Matthew Vanlear* was to be his co-security. There is no evidence that the order, entered on the minutes of the court, was known to *Miller*, or that any representation was made to him, in relation to the person who was to be his co-security. The court were, therefore, in error, in giving the instructions contained in the first and second bills of exception. It is entirely unnecessary for us to express any opinion on the law, as announced by the court in these bills of exception: as it would be entirely uncalled for by the exigencies of the case. For the reasons above stated, the court below ought to have granted the appellant's prayer in the first bill of exceptions.

The court were right in rejecting the prayer offered by the appellee, in the second bill of exceptions, because the appellant had offered no evidence, that any misrepresentation or fraud had been practiced upon him.

In the third bill of exceptions, the plaintiff prayed the court to instruct the jury, that there does not appear upon the face of the said bond any alteration of the date thereof, which will avoid the instrument; which instruction the court refused to give to the jury, but were of opinion, and so directed the jury, that if they believe that the alteration or erasure, mentioned in the evidence, was made after the said defendant executed said writing obligatory, that it avoided the same as to him.

The bond, when presented to the defendant, and when executed by him, was dated as of December — 1823. The only blank in the bond consisted, in not designating the particular day of the month of December, when it was executed. In the bond filed, and upon which this suit has been brought, the month and the year was erased, and in lieu thereof was inserted, "*3rd of May* 1824." The bond thus described, was filed in the Orphans court, and by that court approved. The Orphans court in December 1823, had passed an order, that they would approve a bond signed by the defendant and *M. Vanlear;* the latter, however, having refused to become one of the securities, *Jacob Firey* signed the same, as co-security, in the place of *M. Vanlear*, and the bond thus signed, as we have seen, was ultimately approved by the Orphans court, as

appears by the alteration of their order. The alteration in the date, was no doubt occasioned by the delay of the principal obligor, in producing the bond to the Orphans court. It does not appear by whom the alteration was made, nor is it material to enquire, because there is no evidence it was made by the plaintiff, and we consider the alteration wholly immaterial; it did not in the least degree, tend to alter or enlarge the liability of the defendant.

As regards the statute of limitations, the rights of the defendant are in no manner affected. By the act of 1798, ch. 101, sub. ch. 12, sec. 4, guardians' bonds are placed, in all respects, on the same footing with bonds given by executors and administrators; and by the act of 1829, ch. 24, sec 21, limitations begin to run from the *passing* of such bonds. The time of the passing of this bond, within the meaning of this act of Assembly, is the day on which it was approved by the Orphans court.

If the above views are correct, the court were in error in refusing to give the instruction as prayed by the plaintiff, and in giving the direction which was given by them in this exception.

In the fourth exception, the court refused to instruct the jury, that if they believed that at the time of the execution of this bond by *Miller*, the place of the date thereof, either of the day, month, or year, was left blank,—that the fact of filling up or alteration of said date, to make it correspond with the time of delivery, does not avoid the bond as to *Miller;* but instructed the jury, that if they believed the alteration or erasure, above mentioned, was made after the defendant executed the said writing obligatory, and without his consent or authority, that it revoked the same as to him. Believing, as we do, that the alteration in the date of the bond was wholly immaterial; and there being no evidence that it was made by the plaintiff, the validity of the bond could in no manner be affected by the defendant's failure to consent to such alteration; and therefore think the court were in error, both in refusing the instruction prayed, and giving the direction adverted to.

JUDGMENT REVERSED AND PROCEDENDO ORDERED.

Sebastian Ramsburg and others, Building Committee of the German Reformed Congregation of Jefferson, *vs.* George McCahan.—*December* 1845.

M covenanted with *R and others*, building committee of the *G. R. Congregation*, that he should and would, on or before *the 1st day of, &c., next*, in consideration of, &c., to be paid to him at the times thereinafter specified, well and substantially erect, build, and completely finish, a church for the said congregation, upon the ground belonging to them, according to the specifications and dimensions following, &c. The said *M* further covenanted, that he should do or cause to be done *within said time*, all the work necessary to finish and complete the said church. The committee agreed to pay him a specified sum, when he should give bond for the performance of the work; another sum when the brick wall should be commenced, &c. The parties further covenanted, that in case the building committee should *direct any more work to be done* than is mentioned, then they should pay *M* so much money as such work shall be worth, upon a reasonable valuation. Held:

1st. That if an action could be sustained on this covenant for the work done by *M*, then the action of *assumpsit* could not be sustained for the same.

2nd. That *M* could recover for the extra work, though done after the time stipulated in the covenant, unless the time for the completion of the building, including the extra work, was of the essence of the agreement.

3rd. That this covenant, in relation to the extra work, is an independent covenant, the parties not designing to restrict the completion of the extra work to the day designated in the contract.

4th. If the covenant in relation to extra work was a dependent covenant, then if, such work had been required to have been performed the day before that designated for the completion of the church, the plaintiff would have been bound to have performed it, although such performance might have required months.

5th. That as time in relation to the extra work, where that was required to be done, is not of the essence of the covenant; a suit for it could only be maintained on the covenant.

6th. That if the agreement had contained no covenant in relation to extra work, its terms would have made the time for the completion of the building of its essence.

Where the right to recover, depended upon the performance of work alleged to have been done, of which proof was given, it is error in the court refusing the prayer of the defendant, that the plaintiff is not entitled to recover, to add an instruction, that the plaintiff under the proof is entitled to recover. This takes the fact from the jury.

Where the contract declared, that a party should be paid for work, "as much money as such work shall be worth, upon a reasonable valuation," the true construction of this is, that the party shall be paid as much money as

the work when done shall be reasonably worth, and not that the party claimant should procure a valuation, to be made as a rule of evidence. The parties did not designate any person to make the valuation.

APPEAL from *Frederick* county court.

This was an action of *assumpsit*, brought on the 11th January 1843, by the appellee against the appellant. The defendants pleaded *non assumpsit*, and the jury found a verdict for the plaintiff.

1ST EXCEPTION. The plaintiff to support the issue on his part, offered in evidence, by *George Moore*, that he is a stone and brick mason by trade; that as such, he, together with his partner, *N. P. Haller*, were employed by the plaintiff to do the stone and brick work of a church, to be built on a lot of ground owned by the *German Reformed Congregation of Jefferson*, in the town of *Jefferson*, which church was to be built by the plaintiff. That when he was about to commence said work, he thought that the foundation was not, as then dug out, sufficiently solid to support the building; that he so stated to the plaintiff, who thought otherwise, and said that he would stand to the work; that at the time, the defendants were also present, and that *Sebastian Ramsburg*, one of the defendants, said, that the foundation must be dug deeper, so as to get on a good foundation, even if it should cost five hundred dollars more; then the plaintiff said, if you wish it dug deeper, you must do it at your own cost, and then have the foundation dug deeper; the said *Lakin* and *Feaster* also requiring, that the same should be dug deeper; that said foundation was dug deeper, and the ground was no better for a foundation than before, and that such deepening of the said foundation, cost the said plaintiff more money, both on account of the increased excavations, as also the additional quantity of stone and mason work.

The plaintiff further proved, by *Hiram Keefer*, who is a carpenter, that he had examined the church in *Shepherdstown*, in *Virginia*, as also the said church in the town of *Jefferson*, built by the plaintiff for the *German Reformed Congregation*, as hereinafter stated, for the purpose of comparing the work done in each church, and ascertaining the extra work, if any, that was done in the church built by the plaintiff, in the town

of *Jefferson*, aforesaid. That on a comparison, he found that there was work done in and about the said church built by the plaintiff, at the town of *Jefferson*, more than the work done in the said church at *Shepherdstown*, in the finish of the gallery, &c., and various other extra work, amounting to the sum of between three and four hundred dollars in value.

The plaintiff, then, further to support the issue on his part joined, offered in evidence the following articles of agreement, the due execution of which, by all the parties thereto, under their respective hands and seals, was admitted :—

"Articles of agreement, made on the 26th July 1841, between *George McCahan*, of the one part, and *Sebastian Ramsburg*, *William Lakin*, and *John Feaster*, *Sen.*, building committee of the *G. R. C. of Jefferson*, in the county and State aforesaid, of the other part, as followeth :

1st. "The said *George McCahan*, for himself, his heirs, executors and administrators, doth hereby covenant with the said *S. R.*, *W. L.*, and *J. F.*, *Sen.*, building committee aforesaid, their, &c., that he, the said *George McCahan*, his, &c., shall and will, on or before the 1st day of June, now next ensuing, in consideration of the sum of $3050, to be paid to him at the times hereinafter mentioned, well and substantially erect, build, and completely finish, in a neat and workmanlike manner, a church or house of worship for the *G. R. C. of J.*, upon the ground belonging to said congregation, in the town aforesaid, according to the specifications and dimensions following: The size of the church to be forty-three feet by fifty-three, to be built with brick, after the plan of the *G. R. Church* in *Shepherdstown*, *Va.*, with the exception, first, that the floor be at least five feet from the surface of the ground, &c. And the said *George McCahan*, his, &c., shall do, or cause to be done, within said time, all the work necessary to finish and complete the said church or house of worship, in a neat, substantial, and workmanlike manner; and also shall and will provide, good, proper, and sufficient materials, of all kinds whatsoever, for erecting, completing, and finishing said building. And said *S. R.*, *W. L.*, and *J. F.*, *Sen.*, building committee aforesaid, doth for themselves, their, &c., covenant with the said

George McCahan, his, &c., that they, the said *S. R., W. L.*, and *J. F., Sen.*, their, &c., shall and will, well and truly, pay or cause to be paid, unto the said *George McCahan*, his, &c., the sum of $3050, in manner following, to wit: $762.50, part thereof, when the said *George McCahan* shall execute and deliver to the building committee aforesaid, to be approved by them, a penal bond, for the true and faithful performance of the covenants and agreements, herein set forth and mentioned; $762.50, another part thereof, when the brick wall shall be commenced; $762.50, another part thereof, when the said building shall be put under roof; and the remaining $762.50, when the same shall be completely finished.

"And it is hereby further agreed to, by and between the said parties to these presents, that in case the said *S. R., W. L.*, and *J. F., Sen.*, building committee aforesaid, shall direct any more work to be done, in and about said church, than is mentioned in the foregoing agreement, that then the said building committee shall pay, or cause to be paid, unto the said *George McCahan*, his, &c., so much money as such work shall be worth, upon a reasonable valuation, any thing herein contained, notwithstanding. In testimony whereof, they have hereunto set their hands and seals, the day and year herein first written."

The plaintiff further proved, by *W. L. Spangler*, that the church or building described in said articles of agreement, was finished by the plaintiff sometime in the fall of the year 1842; and the plaintiff further proved, by *Levi Mobberly*, that he was present sometime in the fall of the year 1842, when the said church was finished; that he saw the plaintiff deliver the key of the same to the said *Ramsburg*, who said, that he was acting for himself and the rest of the committee, and that he was perfectly satisfied with said building, to which the plaintiff replied, that he hoped that as he, the said *Ramsburg*, was satisfied, that he would make him, the said plaintiff, satisfied, and that said *Ramsburg* said, that he would; that said church was taken possession of, and has been used as a house of worship ever since by the *G. R. C.*

The defendants then prayed the court to instruct the jury, that if they shall believe from the evidence in this cause, that the work done by the plaintiff, and for the price or value of which this suit is brought, was done under and by virtue of said articles of agreement, under seal, offered in evidence by the plaintiff, though not done by the time specified in said agreement, that then, for the doing of said work, the plaintiff is not entitled to recover in this form of action; which instruction the court, (T. Buchanan and R. H. Marshall, A. J.,) refused to give, being of opinion, and so instructed the jury, that the plaintiff, under the proof offered, is entitled to recover for the price or value of said work so done by him; to which opinion and instruction of the court, the defendants excepted.

2nd Exception. The defendant on the aforegoing testimony, prayed the court to instruct the jury, that for all work done by the plaintiff, which the jury shall believe was extra work, directed by the defendants to be done, and done by virtue of said agreement, the plaintiff is not entitled to recover the price or value of the same in this form of action; which instruction the court refused to give. The defendants excepted.

3rd Exception. The defendant, then, on the aforegoing evidence, prayed the court to instruct the jury, that for all the said work done by the plaintiff, which the jury shall believe was extra work done, under and by virtue of said agreement, the plaintiff is not entitled to recover for the same, even in this form of action, unless the jury shall believe from the evidence, that there was a reasonable valuation of the same, to ascertain what the said extra work was worth, and that the plaintiff gave notice of such valuation to the defendants before this suit was instituted; which instruction the court refused to give; the defendants excepted.

4th Exception. The defendants, then, on the aforegoing evidence, prayed the court to instruct the jury, that if they shall believe, from the evidence in the case, that the extra work that was done in and about said church, other than the work particularly mentioned in said articles of agreement, and for which the said defendants had bound themselves in said agreement to pay the sum of $3050, was done in and about the

said church or building, standing and being on a lot of ground owned by said *German Reformed Congregation of Jefferson;* and that said church is in the possession, occupancy, and enjoyment of said congregation, that then the plaintiff is not entitled to recover for the same against the defendants, in this form of action; which instruction the court refused to give; the defendants excepted.

The defendants prosecuted this appeal.

The cause was argued before Archer, C. J., Dorsey, Chambers, Spence, Magruder and Martin, J.

By George Schley and Palmer for the appellants, and
By Wm. Schley for the appellee

Archer, C. J., delivered the opinion of this court.

The plaintiff had entered into articles of agreement with the defendants, stating themselves in the contract to be the building committee of the *German Reformed Congregation of Jefferson,* for the building of a church on a lot of ground belonging to the said congregation; and offered evidence to the jury, to shew the building of the church, and that extra work had been done on the church, for which building and extra work, he sought to recover in this action.

The appellee, on his part, and in consideration of *three thousand and fifty dollars,* warranted and agreed, to erect, build, and completely finish, in a neat and workmanlike manner, a church or house of worship, for the *German Reformed Congregation of Jefferson,* upon ground belonging to said congregation, before the 1st day of June 1842. The size and plan of the church to be similar to the *German Reformed Church* in *Shepherdstown, Virginia.* The appellants covenanted, on their part, to pay to the appellee the sum of $3050, in manner following, to wit: $762.50, part thereof, when the appellee should execute a penal bond, for the faithful performance of the covenants on his part; $762.50 when the brick wall should be commenced; $762.50 when the building should be put under roof; and the remaining $762.50, when the same shall be completely finished. And the agreement contained this further covenant:

"It is further agreed, between the parties to these presents, that in case the said *Ramsburg, Lakin and Feaster*, as building committee aforesaid, shall direct any more work to be done in and about said church than is mentioned in the aforegoing agreement, that then the said building committee shall pay to the said *George McCahan*, so much money as such work shall be worth, upon a reasonable valuation."

It appeared in evidence, that the church was finished sometime in the fall of 1842; that the key of the church was delivered to one of the appellants, *Ramsburg*, who said he was acting for himself and the rest of the committee; and that he was perfectly satisfied with the building, and promised to make the appellee satisfaction therefor; and that the church was taken possession of, and has been used as a house of worship ever since, by the *German Reformed Congregation*. Upon this, the appellants prayed the court to instruct the jury, that if they shall believe from the evidence in the case, that the work done by the plaintiff, and for the price or value of which this suit is brought, was done under and in virtue of said articles of agreement, under seal, offered in evidence by the plaintiff, though not done in the time specified by the said agreement, that then, for the doing of said work, the plaintiff is not entitled to recover in this form of action; which instruction the court refused to give, being of opinion, and so instructed the jury, that under the proof offered, the plaintiff is entitled to recover for the price or value of the work so done by him.

If an action can be sustained on the covenant between the parties, for the work done by the plaintiff, no recovery can be had in this action. The covenant contains a stipulation for the payment of the extra work, and the plaintiff would be entitled to recover thereon, unless the time for the completion of the building, including the extra work, was of the essence of the agreement.

It has heretofore been decided by this court, in *Watchman & Bratt*, 5 *G. & J.*, 262, that the true intent of the parties, as apparent in the instrument, should determine whether covenants are independent or conditional; and guided by this rule, we have no difficulty in reaching the conclusion, that the cove-

nant to perform the extra work, referred to in the agreement, is an independent covenant, the parties in relation thereto, not designing to restrict the completion of the extra work to the day designated in the contract. If extra work had been required to have been performed, the day before that designated for the completion of the church, the plaintiff would have been bound to have performed it, although such performance might have required months, and we cannot, therefore, suppose that the parties, as to such extra work, designed any restriction as to time. We therefore think, that whatever may be the true construction of the agreement as to time being the essence of the contract had no extra work been required to be done, in relation to the extra work, the covenant is wholly independent of the agreement, to complete the building at the time designated in the contract; and that as time in relation to such contract, is not of the essence of the agreement, a suit for the extra work could only be maintained on the covenant.

Had the agreement contained no covenant in relation to the extra work, the terms of the agreement would have made the time for the completion of the building, of the essence of the contract. But the parties having stipulated, generally, for doing of extra work, which might require a longer time than that designated in the agreement, and which extra work might be necessary to complete the building, it is clear they did not consider time, as of the essence of the contract. The covenant for the extra work is peculiar in its phraseology. It stipulates, in case the building committee shall direct any more work to be done, in and about said church, than is mentioned in the agreement, that then they shall pay therefor a reasonable valuation. Under this stipulation, the extent and kind of work, other than that mentioned in the agreement, was left discretionary with the committee, and the completion of the church might have been, in consequence, postponed far beyond the day designated in the contract. We are inclined, therefore, to think, that not only as it regarded what has been considered as extra work, but even in the erection of the church, time was not regarded by the parties as of the essence of the contract.

This view of the case, induces us to decide, that the court were in error in refusing to grant the defendant's prayers in the first and second bill of exception, and in granting the instruction, which was given by them to the jury in the first bill of exception. This instruction, however, is liable to another objection; the question of fact, as to the performance of the extra work, was taken from the jury.

We think the court were right in the opinion expressed by them in the third bill of exceptions. If the action of *assumpsit* had been the appropriate remedy to recover the value of the extra work, we do not think it would have been necessary as a preliminary step, for the plaintiff to have had a valuation of the work done, and to have given notice of such valuation to the defendants. It is true, the covenant obliges the defendants to pay as much money as the work shall be worth, upon a reasonable valuation. But the true construction of this agreement is, that the defendants shall pay the plaintiff what the work shall be reasonably worth: and not, that the plaintiff should procure a valuation, to be made as a rule of evidence. We are strengthened in this conclusion by the fact, that the parties did not designate any person to make the valuation. In the cases which have been referred to, in which it was held as indispensable, that an estimate should be made as a rule of evidence, it will be found, that there has been a designation by the parties of the person who should make it. *Vide*, 11 *G. & J.*, 72, and the cases there referred to.

The question decided in the fourth and last bill of exception, is substantially the same decided on the respondent's prayers, in the first and second bill of exceptions, and is liable to the objections stated in the examination of those exceptions. Upon this exception other questions were discussed, as to the right of the plaintiff to recover against the defendants, which we do not think are raised by the prayer, and on which, therefore, we deem it unnecessary to express any opinion.

JUDGMENT REVERSED.

JOHN MORGAN *vs.* JOHN BITZENBERGER.—*December* 1845.

B sold *M* a parcel of land, executed a deed of bargain and sale therefor, and put him in possession. The deed contained a receipt for the purchase money. The proof showed, that *M*, at time of sale, paid part of purchase money. Shortly after, paid another part, and gave his promissory note for the balance; before the note fell due, the vendee took up the note, by his own order on *F*, for the like sum. This order *F* refused to pay, and upon the fact of the refusal being communicated to *M*, he asked *B* to hold on to the order, that *F* must pay it. In an action of *assumpsit*, to recover the unpaid part of the purchase money; HELD:

1st. That the claim was not within the statute of frauds.

2nd. That the evidence was sufficient, in point of law, to go to the jury, to rebut the *prima facie* evidence of the payment of the purchase money, created by the receipt and release in the deed.

It is the province of the court to determine, whether evidence is legally calculated to conduct the mind of a jury to a conclusion.

It is the province of the jury to determine, the sufficiency or insufficiency of the evidence in fact, to prove the affirmative or negative of the issue.

Payment or non-payment of the purchase money, was, in this case, exclusively for the jury.

Taking a promissory note for a simple contract debt, does not, *per se*, extinguish the original cause of action.

Where a note of the debtor was taken for a debt, and the creditor afterwards sues him upon the original contract, proof that the note was redelivered to the debtor, sufficiently accounts for its absence at the trial.

The order of a debtor on a third party, given to his creditor, which was dishonored, and tendered to the debtor, interposes no objection to recovery upon the original consideration.

APPEAL from *Frederick* county court.

This was an action of *assumpsit*, brought on 25th February 1843, by the appellee against the appellant. The plaintiff declared in *indebitatus assumpsit*, in the sum of, &c., for certain land and premises, bargained, sold and conveyed by the plaintiff to the defendant, at his request, &c. The defendant pleaded *non assumpsit*. The jury found a verdict for the plaintiff.

In this case, the plaintiff to sustain the issue on his part joined, offered in evidence, by parol, to the jury, that the tract of land and premises, with the appurtenances, to recover the purchase money for which this action was brought, was sold and conveyed, by deed, by the plaintiff to the defendant, for the sum

of $355, the evidence by parol being admissible, because of the deeds being in the possession of the defendant, not on record, and which said defendant, though notice had been given to produce the same, failed to do so. The plaintiff, then, further proved to the jury, that at the time, and of the execution and delivery of said deed to the said defendant, for the said land and premises, he, the said defendant, paid to the said plaintiff, in money, the sum of $55, part of the purchase money, and that said defendant, shortly after, paid to said plaintiff the sum of $100, part of the purchase money, and gave his promissory note for the sum of $200, payable ten months after date, viz :—

"Ten months after date, I promise to pay to *John Bitzenberger*, or order, two hundred dollars, for value received. Witness my hand, this 31st day of May 1841.

$200. JOHN MORGAN."

"Test, JOHN MEASEL."

for the balance of the purchase money. And the plaintiff further proved, that at the time of the sale, and the execution of the said deed, the said defendant went into possession of said land and premises, and has remained in possession thereof ever since. The plaintiff further to sustain the issue on his part, proved, that sometime before the said promissory note became due, the said defendant gave to the said plaintiff an order, viz :

"*Mr. William F. Johnson.* Sir :—Pay *John Bitzenberger*, one hundred and fifty dollars on my account, and oblige yours. JOHN MORGAN.

OCTOBER 15TH, 1842."

upon *Wm. F. Johnson*, for the sum of $150, being the balance due on the said promissory note, and upon giving such order, took up said promissory note from the said plaintiff ; that the said plaintiff presented said order to the said *Wm. F. Johnson*, for acceptance or payment, who refused to account or pay the same, and has never accepted or paid the same, or any part thereof ; that the said plaintiff then called upon said defendant, and offered to return said order, and demanded back the said promissory note, which had been taken up by said defendant, upon giving said order upon said *Wm. F. Johnson;* that said

defendant told said plaintiff, to hold on to the said order, meaning the said order on the said *Johnson*, that he would see said *Johnson*, and he must pay it. The defendant then produced said deed from the plaintiff to defendant for said land, and offered the same in evidence, viz :—

"This indenture, made this 31st May 1841, between *John Bitzenberger*, of, &c., and *John Morgan*, of, &c., witnesseth, that the said *John Bitzenberger*, for and in consideration of the sum of $355, current money, to him in hand paid by the said *John Morgan*, at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, he, the said *John Bitzenberger*, hath granted, &c., and by these presents doth grant, &c., unto him, the said *John Morgan*, all his right, title, interest and estate, of, in, and to, twenty-eight acres of land, more or less, being part of a tract of land, called "*Rocky Hill*," together with, &c., it being the same estate conveyed to the said *John Bitzenberger*, by *Edward* Y. *Goldsborough*, of, &c., by deed, &c.; to have and to hold, &c., unto him, the said *John Morgan*, his heirs and assigns, for and during the lifetime of a certain *James Naylor*. In witness," &c. Which deed was admitted to have been executed and acknowledged in due form of law.

The defendant prayed the court to instruct the jury, that from the evidence offered to the jury, in this case, under the pleadings, the plaintiff is not entitled to recover the purchase money, or any part thereof, specified and agreed to be paid in the deed, from the plaintiff to the defendant, under the evidence in the cause.

First. Because there is no note or memorandum in writing, signed by the said *John Morgan*, of the contract for the sale of the land and premises for which the action is brought, and that the case is within the statute of frauds.

Second. Because there is no sufficient evidence of the non-payment of the purchase money, of $350, for which this action is brought, to go to the jury, to repel and contradict the evidence of the receipt and release, in the deed of conveyance of the payment and receipt of the purchase money, by the defendant to the plaintiff.

Third. Because the remedy of the plaintiff, if he have any, is upon the said order or draft of $150, which was not accepted and paid, or *indebitatus assumpsit* for so much money; and not for land sold and conveyed; which opinion and direction, the court, (T. BUCHANAN and MARSHALL, A. J.,) refused to give. The defendant excepted, and prosecuted this appeal.

The cause was argued before ARCHER, C J., DORSEY, CHAMBERS, SPENCE MAGRUDER and MARTIN, J.

By PALMER for the appellant, and
By GEORGE SCHLEY and WM. SCHLEY, for the appellees.

SPENCE, J., delivered the opinion of this court.

This was an action of *assumpsit*, brought by defendant in error against plaintiff in error, to recover the purchase money for a tract of land sold and conveyed by appellant, by deed of conveyance, and possession delivered to appellant. The appellant pleaded *non assumpsit*.

The defendant in error, to maintain the issue on his part, offered evidence to the jury of the sale of the land and premises; the execution of the deed, to the plaintiff in error; and of his possession of the land from the time of sale. The defendant in error also offered evidence to the jury, that at the time of the execution and delivery of the deed by defendant in error to the plaintiff in error, the plaintiff in error paid to the defendant in error the sum of $55, part of the purchase money; and shortly afterwards, the further sum of $100, of the purchase money; and gave his promissory note to defendant in error, for $200, payable ten months after date.

The defendant in error, offered evidence to the jury, also, to prove, that some time before said promissory note became due, the plaintiff in error gave to the defendant in error, an order or draft on a certain *William F. Johnson* for $150, and that said plaintiff took up his said promissory note. That the said defendant presented said order to *William F. Johnson* for acceptance, who refused to account or pay the same, and who has never accepted or paid the same, or any part there-

of; that the defendant then called upon said plaintiff, and offered to return said order, and demanded back the promissory note which had been given by the defendant to the plaintiff, when he, the said plaintiff, gave the order on *W. F. Johnson*, to the defendant; that the plaintiff told the defendant to hold on to said order; that he would see said *Johnson*, and he must pay it. The plaintiff in error, then, produced the deed from defendant in error to him, for said land, and offered the same in evidence to the jury:—the said deed being admitted to have been executed in due form of law.

"Whereupon the plaintiff in error prayed the court to instruct the jury, that from the evidence offered to the jury, in this case, under the pleadings, the plaintiff, (defendant in error,) is not entitled to recover the purchase money, or any part thereof, specified and agreed to be paid in the deed from defendant in error to plaintiff in error, under the evidence in the cause:—

First. Because there is no note or memorandum in writing, signed by the said *John Morgan*, of the contract for the sale of the land and premises, for which this action is brought; and that the case is within the statute of frauds.

Secondly. Because there is no sufficient evidence of the non-payment of the purchase money of $350, for which this action is brought, to go to the jury to repel and contradict the evidence of the receipt and release in the deed of conveyance, of the payment and receipt of the purchase money, by the defendant to the plaintiff.

Thirdly. Because the remedy of the plaintiff, if he have any, is upon the said order or draft, of $150, which was not accepted or paid, or *indebitatus assumpsit* for so much money, and not for land sold and conveyed.

Which opinion and direction the court refused to give, and the defendant, (plaintiff in error,) excepted.

That this case was not within the statute of frauds, is, in our judgment, conclusively settled by the case of *Wolf vs. Hauver*, 1 *Gill*, 84, where the court says: "The conveyance of the land, and the delivery of possession, in pursuance of the deed, or in other words, the execution of the contract on the

part of the plaintiff, raises a duty on the part of the vendee to pay the consideration money, which will sustain the count. Why should not such a duty be created, as well by the sale of land, as by the sale of goods? It is said, the subject matter of the contract savours of the realty, and therefore the count is bad. But we have seen no case which sanctions this technical reason, and unless such case be furnished, deciding the question upon satisfactory grounds, we should feel ourselves bound to say, that the law equally implies a promise to pay, in the case before us, as it does in the case of sales of goods, wares, and merchandize "

The case of *Wolf vs. Hauver*, 1 *Gill*, 84, also settles the question conclusively, that the receipt in a deed of bargain and sale, for the consideration money, is only *prima facie* evidence of that fact; and that it was competent for the plaintiff to offer evidence to the jury, to rebut such *prima facie* evidence, and show, that the purchase money was not in fact paid.

One of the grounds relied on by appellant's counsel, was the insufficiency of the evidence to repel and rebut the *prima facie* evidence of the payment of the purchase money for the land, created by the receipt and release in the deed.

It is the province of the court to determine whether evidence is legally calculated to conduct the mind of the jury to a conclusion, but it is the province of the jury to determine, the sufficiency or insufficiency of the evidence to prove the affirmative or negative of the issue. There certainly was evidence, admissible and competent, as disclosed by the record, given to the jury, and it was their province to determine the question, whether the purchase money was, or was not paid, as stated in the deed.

We do not find the doctrine sanctioned by authority, that the taking a promissory note for a simple contract debt, *per se*, extinguishes the simple contract, or original cause of action. 6 *H. & J.*, 166.

The answer to the argument, founded on the non-production of the promissory note on the trial, is found in the fact, that the proof shewed that it had theretofore been delivered to the defendant, and the law authorises neither unnecessary or unreasonable demands.

The position taken by appellant's counsel, in relation to the draft or order on *Johnson*, is obnoxious to the same objection as the one in relation to the promissory note, it did not extinguish the original contract. It had been tendered to appellant, after acceptance was refused by *Johnson*, by appellee, and appellant insisted on appellee's retaining it; and further, it would seem that it was in court at the trial.

JUDGMENT AFFIRMED.

Henry Riarl *vs.* Henry Wilhelm and Samuel Wilhelm. *December* 1845.

In an action of *assumpsit*, the plaintiffs proved, that they and defendant were partners; that in *April* 1841, the defendant told the witness, that two or three days before, they had dissolved partnership. In March 1841, there was a balance of cash to the credit of the firm; and in June of that year, it was drawn out by the defendant, he urging, as a reason why he drew it out, that if the plaintiffs got it, he did not know whether he could ever get any of it again; the plaintiffs further proved, that in August 1842, the defendant stated the balance of the money in bank, in March 1841, belonged to the plaintiffs, and he had drawn the sum of, &c., thereout, by check. The defendant offered no proof; Held:

1st. That a prayer by the defendant, to instruct the jury, that the evidence was not sufficient to enable the plaintiffs to recover upon, admitted, as proof, all the facts sworn to, and all rational inferences deducible from such facts.

2nd. That the proof did not tend to prove a promise from the defendant, to pay the plaintiffs any sum.

3rd. The ground on which partners, after a dissolution, can sue each other, in relation to what had been partnership funds or effects, is, that the joint interest as partners having ceased, a new contract had been made between the parties, in their individual, as distinct from their partnership characters.

4th. The joint interest can only be terminated by an agreement, vesting a separate title or interest in the thing, to which, before that time, there had been a joint title, and the rule equally applies to money, as to choses in action.

5th. Property which belonged to *three* partners, cannot become the separate property of *two* of them, except by an express agreement to that effect.

In every case in which property has been held by partners, it is necessary, to enable one of them to maintain an action at law for it, against another, to show a final settlement of the partnership concerns, and a distribution of the property to the party claiming, which, in effect, is a release of the rights of the other.

If the claim be for money, there must be a promise to pay an ascertained sum.

It is not necessary that a witness should testify to a positive promise. As in other cases, so in this, what is sufficient proof, is a question for the jury, and the fact may be established by circumstances, and just and fair inferences from facts, as well as by positive testimony.

But, in this case, where two, of three partners, are jointly suing the third, before it can be established, that he had made himself responsible to them, there should be proof of some fact going to show, that they had, *inter se*, entered into a new agreement.

APPEAL from *Carroll* county court.

This was an action of *assumpsit*, commenced on the 13th September 1842, by the appellees against the appellant. The cause was submitted to the jury on the general issue, who found a verdict for the plaintiffs.

1ST EXCEPTION. The plaintiffs to support the issue joined on their part, offered in evidence to the jury, by —— *Wilhelm*, a competent witness, that more than fifteen years ago, the plaintiffs were in partnership with each other, as drovers; at that time he did not know the defendant, and never knew there was such a man, until less than ten years ago. That within the last three or four years, the plaintiffs and defendant have been engaged and connected together as partners, in the business of drovers; but whether they were all three partners together, or whether *Samuel Wilhelm* and *Riarl* were partners, and *Henry Wilhelm* had an interest in *Samuel Wilhelm's* interest, in the firm of *Wilhelm & Riarl*, witness does not know; that the witness was employed by them, in the driving of their stock from *Pennsylvania* to the city of *Baltimore*; that both, *Henry Wilhelm* and *Samuel Wilhelm*, bought stock in *Pennsylvania* for the concern, and that the stock, when driven to *Baltimore*, was sold to butchers, sometimes by the defendant, and sometimes by each of the plaintiffs; that frequently, whilst he was employed in driving their stock to *Baltimore*, in company with the defendant, he understood from the defendant, that both the plaintiffs were concerned with him in the droving business, each having an equal interest therein; that he recollects once, whilst thus driving, the defendant observed, "they would have made much more money, if it had not been a three-handed business;" that the business was car-

ried on in the partnership names of *Wilhelm & Riarl*, and *Riarl & Wilhelm*. And further offered evidence, by *George Suter*, a butcher of the city of *Baltimore*, that he had dealt with the firm for several years, buying stock of them separately; sometimes dealing with one of the firm, and sometimes with another, having bought stock separately from each of them, who dealt with him, and whom he always regarded as partners, in the said droving business; that on the last day of March, or the first day of April 1841, the defendant told the witness, that "they, (meaning, as the witness understood him, the plaintiffs and defendant,) had, two or three days before, dissolved partnership, and had settled their affairs;" the defendant told the witness, that *Samuel Wilhelm* had quit the drover's business, but that he, the defendant, would continue to carry it on separately on his own account, and that he hoped he, the witness, would continue to buy stock of him. And further offered in evidence, by *John Fisher*, the cashier of the *Bank of Westminster*, that said concern opened an account with the said bank, and transacted its business therewith, and had notes taken for stock sold by them, discounted thereat, for and on account of the concern; that the checks by which the money of the concern was drawn out of the bank, were signed, some of them "*Henry Riarl & Co.*," and some "*Samuel Wilhelm & Co.*," the first of said signatures being in the handwriting of the defendant, and the second in that of the plaintiff, *Samuel Wilhelm*. That after the dissolution of the firm, reported to have taken place, and sometime in June 1841, the defendant applied to him, to pay out to the defendant the balance due to the firm by the bank, which, from what he had heard of disputes between the partners, he refused; but, upon the defendant threatening an immediate suit against the bank, if he did not so pay, the witness permitted him to check out all the said balance, except sixty-seven dollars and some cents, upon his giving bond to indemnify the bank. That the witness regarded the plaintiffs and defendant, as partners in the said firm. The said defendant urged as a reason why the money should be paid to him, that if *Samuel Wilhelm* got the money, the defendant did not know whether he could ever get it, or any

of it, again, as he was not sure that *Samuel Wilhelm* was worth any thing; and that if his father got it, he lived in *Pennsylvania*, and defendant would have great difficulty in getting any thing out of him; that on the 20th August 1842, in a conversation between the witness and the defendant, the latter stated, that in the month of March 1841, of the balance of the money then standing in the said bank to the credit of the said firm, the sum of $3350, belonged to *Wilhelm*, (meaning the plaintiffs, as the witness understood.) That on the 14th June 1841, the defendant, by a check drawn by him, drew out of the said bank, of the money standing to the credit of said firm, the sum of $2025.

Whereupon, the defendant made the two following prayers to the court:—

1st. The defendant, by his counsel, prays the court to instruct the jury, that the plaintiffs, from the pleadings and evidence in this case are not entitled to recover: because they have not introduced to the jury, any sufficient evidence of a final settlement between them and the defendant, of all their partnership accounts and transactions, and the striking of a balance due to the plaintiffs, to be submitted to the jury, to sustain this action in the form it is brought.

2nd. Because there is no evidence given to the jury, in this case, to prove a promise to pay to the plaintiffs any balance found due to them by the defendant, even if it should be believed, that a final settlement of all the partnership accounts and transactions has been made, and a balance struck; and because such promise is necessary, to enable the plaintiffs to sustain this action, in case of a settlement and balance struck.

Which prayers were refused by the court, (Dorsey, C. J., Wilkinson and Brewer, A. J.,) and to such refusal the defendant excepted.

2nd Exception. The defendant, by his counsel, upon the facts stated in the first bill of exceptions, prays the court to instruct the jury:—

That if they believe from the evidence, that the plaintiffs and the defendant were partners, and previous to the action brought, came to a settlement of their partnership accounts,

and struck a balance; which balance was in favor of the plaintiffs in any particular sum, and that said plaintiffs were entitled to an equal proportion of that balance, and that thereupon the partnership was dissolved, yet the plaintiffs cannot recover, unless the jury also find from the evidence, that the defendant promised to pay that balance to the plaintiffs jointly: because a balance struck among partners, and a dissolution of the partnership, is not sufficient to sustain an action of *assumpsit*, unless there is also a promise by the defendant to pay that balance. But the court refused to grant this prayer, because it did not appear from the proof and proceedings in the cause, or the claim for which a recovery was sought, by the plaintiffs, at the hands of the jury, that in the settlement of the affairs of the partnership, (if the jury find that any such settlement was made,) that there was a balance in the hands of the defendant due to the plaintiffs; nor did it appear that the suit was brought to recover any such balance, the plaintiffs insisting, that on the settlement which they allege did take place between the partners, there was no balance in the hands of the defendant due to the plaintiffs; but that after the dissolution of the partnership, upon their settlement of their affairs, and dividing and distributing their partnership effects between themselves, three thousand and fifty dollars of the balance standing to their credit in the *Bank of Westminster*, was assigned, or allotted to the plaintiffs, and that said sum of money was, subsequently, wrongfully and in violation of the said partnership settlement, withdrawn from the bank by the defendant, and appropriated to his own purposes, and that they therefore had a right to recover it from the defendant, in an action for money had and received to their use. Under such circumstances, the court, without considering the accuracy or inaccuracy of the principle of law asserted by the prayer, refused the instruction prayed, on the ground of its irrelevancy to the matters in controversy before the jury; and its tendency, if granted, to bewilder and mislead them. To which refusal of the court the defendant excepted.

3rd Exception. In addition to the facts contained in the defendant's first bill of exceptions, which are to be taken and

considered as a part of this, his third bill of exceptions, the defendant further offered evidence by *John Fisher*, the cashier of the *Westminster Bank*, on his cross-examination, that on the 13th day of March 1841, the firm of *Henry Riarl & Co.*, had on deposit in the *Westminster Bank*, the sum of $6096.21; and on the same day said *Riarl*, defendant, drew $150; by check; and *Samuel Wilhelm* drew $800, by check. On the 20th March 1841, a check dated March 1st, 1841, payable to *McDevitt*, and drawn by defendant, was presented to the bank, and paid to *McDevitt;* on the 27th March 1841, plaintiff, *Samuel Wilhelm*, drew from the bank $1084; March 29th 1841, *Riarl* drew $100; April 5th, 1841, *Wilhelm*, drew $550, and $300, same day, $150 drawn by *Riarl;* 17th April 1841, *Wilhelm* drew two checks, one payable to self, for $300, the other, to *Layer's* protested note, $332 endorsed by the said firm, and discounted for the benefit of the plaintiffs and defendant at said bank; 14th June, *Riarl* drew $2025. August 9th, same year, *Wilhelm* drew balance, $67.71. The firm got credit for a protested note, the amount of which was, before the institution of this suit, drawn out of said bank by the defendant; and further offered evidence, that two or more of said checks were drawn by said *Samuel Wilhelm*, to pay the debts of the said firm; and that one of such checks, for $300, was drawn to enable the *Barringers*, butchers in *Baltimore*, to pay at maturity, a note for a much larger amount, which they had given to the said firm for stock sold to them, and which the said firm had discounted for its account and benefit, at the said bank; and that said $300 was subsequently, and prior to the 12th of June 1841, paid by said *Barringer* into said bank, to the credit of the said firm, and on the said 12th day of June was checked out of the said bank by the said defendant.

Whereupon the defendant, by his counsel, prayed the court to instruct the jury, that the evidence in the cause, taken altogether, is not sufficient to prove and justify the jury in finding a verdict, that there was a final settlement and balance struck of all the partnership business, and a dissolution of the partnership; and a promise by the defendant to pay the plaintiff

such balance, or any specific ascertained sum; which prayer the court refused to grant; the defendant excepted.

The judgment being against the defendant, he prosecuted this appeal.

The cause was argued before ARCHER, C. J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By RAYMOND and PALMER for the appellants, and
By W. P. MAULSBY for the appellee.

CHAMBERS, J., delivered the opinion of this court.

This is an action of *assumpsit*, for money had and received by defendant to the plaintiff's use, with a count also on an *insimul computasset*.

The plaintiff below, the appellee here, proved, that for several years prior to the suit, a partnership had existed between the parties, plaintiffs and defendant, and that from time to time, the firm had obtained credits at the *Bank of Westminster*, in which were considerable sums of money standing to the credit of the firm. The plaintiff proved by the admissions of the defendant, in conversation with the witness, held on the last of March or first of April 1841, that a few days before the conversation, the partnership had been dissolved, and the parties had "settled their affairs." The plaintiff also proved by the cashier of the bank, that in a conversation with defendant, held on the 20th August 1841, the defendant stated, that of the balance standing in the said bank to the credit of the firm, on the 1st March 1841, the sum of $3350 belonged to the plaintiffs. This money had been checked for, and drawn out of the bank by the defendant, except a small sum, in June 1841.

No testimony was offered by the defendant, who, thereupon, moved the court to instruct the jury, that the plaintiffs, from the pleadings and evidence in the cause, were not entitled to recover, upon the ground, that no evidence had been given to prove a promise to pay the plaintiffs any balance found due on a final settlement.

This prayer to the court, necessarily admitted, as proof before the jury, all the facts sworn to by the witnesses, and all rational inferences deducible from such facts.

We have attentively considered the testimony, and cannot find in any part of it the slightest fact or inference, tending to prove a promise from the defendant, the now appellant, to pay the plaintiffs below, the appellee here.

The ground on which partners, after dissolution, can sue each other, in relation to what had been partnership funds or effects, is, that the joint interest, as partners, having ceased, a new contract had been made between the parties, in their individual, as distinct from their partnership characters. The joint interest can only be terminated by an agreement, vesting a separate title or interest in the thing, to which, before that time, there had been a joint title.

It is by no means important in this view of the case, whether the credit in the bank is to be regarded as a chose in action, or as evidence of there being so much money, the property of the firm, a question which was much debated. The same law would apply in either case.

We will treat it as money, according to the doctrine of the appellees. This money the appellant received, and the question was, whether, having been placed there as the money of the firm, consisting of three persons, it could become the separate property of two of them, except by an express arrangement and agreement to that effect?

In every case in which property has been held by partners, it is necessary, we think, to enable one of them to maintain an action for it against another, to show a final settlement of the partnership concerns, and a distribution of the property to the partner claiming, which, in effect, if not in form, is a release of the rights of the other. If the claim be for money, we think it necessary to prove the final settlement of the partnership concerns, and a promise to pay an ascertained sum. Until this is done, each partner has an interest in the entire thing or sum of money, as he is responsible also for the whole amount of the partnership indebtedness, and, therefore, cannot at law be compelled to part with the property or funds by his co-partner.

It is not intended that a witness must be produced on the stand, to testify to a positive promise. As in other cases, so in this, what is sufficient proof, is a question for the jury, and the fact may be established by circumstances, and just and fair inferences from facts, as well as by positive testimony.

The present case, however, is stronger than that of one partner suing another. Their dissolution and statement of a balance, might well be regarded as circumstances, to aid any general declarations of the opposite party, which acknowledged separate ownership, and make a case for the consideration of a jury. The inference is not entirely in opposition to the premises, to say the least of it, that on a dissolution of a partnership, and a settlement of accounts, each partner is to receive his proportionate share of the property or money remaining for distribution; but it does seem to be a most unwarrantable inference from the same facts, that one partner had made himself liable to the other members of the firm, as joint owners of the property, or joint claimants of the fund. Certainly, before such a conclusion can be reached, there should be some fact going to show, that those other members of the former firm, after a dissolution of the first partnership, had, *inter se*, entered into a second.

Our conclusion is, that the court erred in refusing to give the instruction in the first bill of exceptions.

The question raised by the second exception is, in effect, disposed of by what has been said. The appellant, (the defendant below,) assumed as the basis of his prayer, that the plaintiffs and defendant had been partners, and "had come to a settlement," and struck a balance in favor of plaintiffs in any particular sum; and the court was asked to say, that the jury could not find for the plaintiffs, unless they were satisfied by the evidence, that there was a promise to pay. We think the instruction should have been given. The court refused on the ground, that it did not appear from the proof and proceedings in the cause, that any such balance existed in the hands of the defendant; nor did the plaintiff below claim a balance in the hands of the defendant, appearing by a final settlement; but claimed a certain sum of money, standing in the bank

books to the credit of the firm, as allotted to the plaintiffs upon a settlement of the partnership accounts.

The partnership was fully proved; and it was also proved, that this money had been part of the partnership fund. The plaintiffs are said to claim in virtue of "a settlement of the partnership affairs, as a division and distribution of the partnership effects between themselves," so that the concession in the prayer, of "a settlement, and balance struck in favor of plaintiffs," was in accordance with the pretensions of the plaintiffs. When, therefore, the defendant received this money, he did so, either as a partner,—and if so, there was an end of the case,—or after a dissolution and final settlement of all partnership concerns, and a distribution and allotment to each, of his particular share. In this last case the plaintiffs, clearly, could not maintain a joint action, without an express promise. If *A* receives the money of *B*, one thousand dollars, and at the same time and under similar circumstances, receives one thousand dollars, the money of *C*,—a joint action by *B* and *C* to recover the two thousand dollars, cannot be sustained. The fact, that the plaintiffs claimed it as their joint property, would not make it so. The right of recovery must be determined by the proof, and if the claim is not consistent with the facts, it must fail.

After offering some testimony, as to periods at which various portions of the funds in bank were checked out, and by whom; and for what objects, the instruction, stated in the third exception, was asked by the defendant, and refused.

It is to the same effect, precisely, as the instruction moved for in the first exception, that there was no evidence to justify the finding of the several facts mentioned: that is to say, a final settlement, and balance struck of all the partnership affairs; *and*, a dissolution of the partnership; *and*, a promise to pay the plaintiffs such balance.

What is said above will, therefore, sufficiently explain the views of the court upon this exception. The judgment of the court below is reversed on each of the exceptions: and to enable the appellees to supply the necessary proofs to sustain their action, if they can furnish it, we will order a procedendo.

JUDGMENT REVERSED, &c.

JOHN GLENN *vs.* WILLIAM A. McKIM AND OTHERS.—*December* 1845.

A sum of money deposited in the Court of chancery, being detained there by appeal, it was, in July 1836, agreed, that by and with the consent of the Chancellor, that *G* and *S* be constituted trustees, to receive and invest such funds; and that upon the final hearing of the appeal, the trustees should pay into the Court of chancery the said sum, and all interest and profit which might accrue thereon, subject to the order and decree which might be passed on said appeal. The money was paid to the trustees, who jointly receipted therefor, loaned *H* a part thereof, which was repaid in about twelve months, and immediately thereafter loaned the same sum to *T*, who amply secured the same by mortgage. The mortgagee paid interest thereon from time to time to *S*, *one* of the trustees; and in 1841, repaid him the entire principal sum, when he released the mortgage. All the payments to *S*, were *without* the knowledge, privity, or consent of *G*, who was also ignorant of the release. The cause, upon appeal, was decided in 1838, but no application was made for a distribution of the fund, by those entitled to it by the decree of the Chancellor and appellate court, until 1843, when a petition was filed, requiring the trustees to account. It then appeared that *S* had misapplied the fund received from *T*. There was no charge of fraud, collusion, or criminal remissness on the part of *G*. HELD: that the loan to *T*, was properly and regularly made, and that *G*, as co-trustee, was not responsible for the money received by *S* from *T*, and misapplied.

A trustee is answerable for the default of his co-trustee, if, with a knowledge, that the trust fund is in a course of abuse, that his co-trustee is making an improper use of it, he remains passive, refuses or declines to interfere.

If there be mal-practice, fraud, or evil dealing between co-trustees, then the one shall be answerable for the default of the other.

If judicial trustees are to be made responsible for the acts of each other, in cases where trustees, by agreement, would not be so, it must be by virtue of a bond, taken for the due performance of their trusts, and where one stipulates for the other.

Where there are two trustees, and one of them is in default, without the knowledge, privity, or consent of the other, the parties interested, who selected the defaulting trustee, shall not hold the other, innocent one, liable for the defaulter's acts.

Where two trustees are appointed to receive and invest money, and one of them puts it into the hands of the other to invest, instead of investing it with his associate, and the latter uses the money, both are answerable.

Where money was paid out of chancery, by agreement, to trustees, to invest and make interest pending an appeal, and the trustees, upon the determination of the appeal, were to bring the fund and interest again into court, but, in the meanwhile, other proceedings were had in the cause, which prevented the Chancellor from awarding a distribution of the fund, until

these also were disposed of, the obvious intent of the parties required, that the investment, for the sake of interest, should continue until such other proceedings were acted upon, and it was not the duty, nor the right of the trustees, to prevent the fund from yielding interest, while the court had not, from any cause, the power of distributing it.

APPEAL from the Court of Chancery.

On the 12th November 1834, *Joseph McKim* filed a bill to sell the real estate of his deceased brother, *Samuel McKim;* and on the 4th May 1835, a decree was passed for that object, and *John Scott* and *W. H Marriott*, were appointed trustees to carry it into effect. They gave separate bonds, made a sale, and deposited the proceeds of sale in court. Proceedings in attachment having been instituted by a creditor of one of the parties, distribution of a portion of the fund was delayed; and on the 22nd July 1836, the following agreement was filed in the cause :—

"On the exceptions which were filed by *Joseph McKim* and others, to the account of the trustees, stated and filed by the auditor on 23rd September 1835, by which a part of the proceeds of the sale of the said estate were allotted to *William T. Fleet*, *John A. Fleet*, and *Andrew Fleet*, and to *Laura M. Fisher*, *Margaret J. Fisher*, *Charles M. Fisher*, *Janette Fisher*, and *Elizabeth Fisher*, the Chancellor having sustained the said exceptions by his order of 28th June last, and the said *William T. Fleet* and others, above named, having been excluded by the said order from any participation in the proceeds of the said estate, and having taken an appeal from the said order, it is agreed, by and with the consent of the Chancellor, that *John Glenn* and *John Scott* of the city of *Baltimore*, be constituted trustees, to receive and invest that portion of the proceeds of the said estate, now deposited in the high court of chancery, which was allotted to the said *William T. Fleet* and others, by the said account of 23rd September last past, to wit, the sum of $8912.90, being one-fifth of the net proceeds; and the further sum of $1782.58, to which the said *Laura M. Fisher* and others, will be entitled, provided the said order of the Chancellor is reversed. And it is further agreed, that the register of the Court of chancery, by and with

the consent of the Chancellor, draw checks for the said sums of money, payable to the order of said *John Glenn* and *John Scott*. And it is further agreed, that upon the final hearing of the said appeal, the said *John Glenn* and *John Scott* shall pay into the Court of chancery the said sum of money, and all interest and profit which may accrue thereon, subject to the said order and decree which may be passed on said appeal."

"JOHN SCOTT, for complainant, and solicitor for *Alexander McKim*, *William A. McKim*, and *Guest* and *wife;* and guardian of *Joseph McKim*."

"JOHN GLENN, for *John A. Fleet* and others."

"WM. H. MARRIOTT, for *Jane Hutchinson*."

"T. PARKIN SCOTT, for *Margaret C. Fisher*."

On the 30th July 1836, there was filed in the said cause the following receipt:—

"BALTIMORE, 27*th July*, 1836.—We do hereby acknowledge to have received from *Ramsay Waters, Esq., Reg. Cur. Can.*, a check on the *Farmers Bank of Maryland*, for the sum of $10,695.48, drawn by him, pursuant to the order of the Chancellor, payable to the credit of the real estate of *Samuel McKim*, deceased. JOHN SCOTT,

$10,695.48. JOHN GLENN."

On the 8th March 1843, *James Guest* and wife, *Jane Hutchinson*, *William A. McKim*, and *Margaret C. Fisher*, as heirs at law of *Samuel McKim*, filed a petition, setting forth the previous proceedings in the cause; and that upon the appeal taken, the decree of the Court of chancery had been affirmed, so that the event contemplated by the agreement, has occurred; and that the petitioners are entitled to require, that the aforesaid sum of money, ($10,695.48,) with its profits and increase, should be brought in for distribution among the parties, who had become entitled thereto by the aforesaid decree of the Court of Appeals. That the trustees are jointly responsible, and the petitioners ignorant of the profits made, and for what they might have made, and did not, by reason of their negligence. Prayer, for disclosure, and for an account, &c.

On the same day the chancellor ordered, that the trustees answer the petition.

John Scott, by his answer, admitted it to be true, that in the year 1836, a large sum of money was then on deposite in the Court of chancery of this State, belonging to the estate of the late *Samuel McKim*, the right to which was then in controversy between certain persons, of whom the petitioners are some, claiming to be heirs at law of the said *S. McK.*, and that under an order passed by the chancellor, the precise amount of which this defendant has not, at this time, the means of ascertaining, the said sum of money was directed to be paid to *John Glenn* and this defendant, as trustees, pending the said controversy, to be invested for the benefit of those persons who might be entitled to the said fund. That of the funds so paid, this defendant, with the consent of the said *John Glenn*, loaned on security to *John H. Hunter*, *Esq.*, of *Baltimore*, the sum of $5000, which was repaid as follows: $200, on the 8th May 1837, and the balance, to wit, $5101.67, on the 31st July 1837; and that this defendant then, on the 1st August, in the same year, loaned to *Luke Tiernan*, *Esq.*, then of the city of *Baltimore*, but since deceased, the sum of $5000, on mortgage, and that the said *Luke Tiernan*, *Esq.*, paid to this defendant the interest thereon, from the 1st August 1837, to the 1st August 1839, amounting to $600, and died sometime in that year, without having made any further payments on account of the said debt. That after the death of *Luke Tiernan*, *Alexander Niel*, *Esq.*, one of the executors of the will of *Luke Tiernan*, made the following payments to this defendant on account of said debt and interest, viz., on the 14th January 1840, $150; on the 6th July 1841, $150, for interest to the 1st of August next, thereafter; on the 2nd February 1841, $150, for interest to the 1st January; on the 11th February in the same year, $1000; and on the 28th May 1841, $3080, in full of said debt; and that of this sum so last paid, this defendant, on the 1st June, in the same year, paid to the *Baltimore & Ohio Railroad Company*, he being the administrator upon the personal estate of the said *Samuel McKim*, the sum of $2000, on account of instalments then

due upon the stock belonging to the estate of the said *Samuel McKim*. And this defendant, further answering, saith, that the controversy respecting the right to the said sum of money, was decided by the Court of Appeals, at June term 1838, on an appeal from an order of this court, taken by the *Fleets* against the heirs of said *Samuel McKim*, in which matter this defendant acted both as counsel and agent for the said heirs, and associated *Reverdy Johnson, Esq.*, with him as counsel; that he considered himself as entitled to a fee of $500, for his service, and he requested *John Glenn, Esq.*, to pay out of the fund in his hands a like fee to *Reverdy Johnson, Esq.*, which was done. This defendant further answering, saith, that in November 1837, this matter could have been settled so far as regards the said controversy, but that pending those proceedings, *Samuel G. Hyde* of the city of *Baltimore*, claiming to be a creditor of the estate of *Samuel McKim*, to an amount greater than the whole of the personal estate, had filed a bill in chancery against this defendant, as administrator as aforesaid, and subsequently a supplemental bill, and the distribution of the said funds was enjoined by your honor; to all which proceedings this defendant begs leave to refer, and prays, that the same may be taken and considered as a part of this, his answer to the said petition. And this defendant further answering, saith, that in the year 1837, being then the sole counsel of *Joseph McKim* and *Alexander McKim*, surviving brothers of *Samuel McKim*, each of whom is entitled to one-fourth of the whole estate, both real and personal, except so far as other counsel were employed by him in suits at law and in equity, and considering himself able to meet his own engagements, and being as administrator, charged in some degree with the interests of the other parties, he paid the clerk of the Court of Appeals, $19.60, his fees, on the appeal herein before mentioned; and expecting thereafter to be allowed large fees and commissions from his clients in the settlement of the said estate, and being then in want of money, in the month of November in the same year, borrowed from *John Glenn, Esq.*, $1100 out of the said funds, and the further sum of $250 on the 19th July 1835; and that actuated by

his own impressions of his authority, and then still hoping with the aid of his fees and commissions, and other resources, (in which he has been disappointed,) to be able to pay up the said fund when required, which he had received from the estate of *Luke Tiernan, Esq.*, as aforesaid, he received the same without the knowledge of the said *John Glenn*, and also applied the same as before stated, without his knowledge. And this defendant further answering, saith, that he is aware that this answer is important in many particulars. That for eleven months he has been, from indisposition, rendered almost incapable of attending to business; and in consequence of ill health has been compelled to remove from *Baltimore*. That the copy of the petition in this cause was shewn to him on the 16th March last, past, but not left with him. That as soon thereafter as possible, he came to *Baltimore*, for the purpose of preparing his answer, but that from that time until yesterday, he has been confined by indisposition, and unable to answer the same. He therefore now prays for further time, and he will, &c.

The answer of *John Glenn* admitted, that on the 27th July 1836, *John Scott, Esq.*, and respondent, received for investment $10,695.48, of which was lent to *John H. Hunter*, on the following day, secured by mortgage, $5000; that this sum, with interest, was repaid on the last of July 1831, and on the following day, $5000 were loaned to *Luke Tiernan*, on mortgage. That the interest received of *Hunter*, was in part applied by *Mr. Scott*, for a fee due him of $500, in the Court of Appeals, and Court of chancery, in this cause. That this respondent never knew or supposed, till very recently, that said *Scott* had received of *Mr. Tiernan*, or his representatives, any part of either the principal or interest of said mortgage; and this respondent avers, that such receipt was without the authority, privity, consent, or knowledge, of this respondent. That in the month of August 1836, the said *Scott* and respondent, lent to *Alexander Brown & Sons*, $5856.34, from which deduct a fee paid to *Reverdy Johnson*, on or about 3rd September 1838, and the balance this respondent brings here into court, with this answer, and this respondent prays to have allowed to

him a commission for such investment, and also for $1350, paid out of said fund to *Jno. Scott, Esq.*, counsel of *Joseph* and *Alexander McKim*, with interest thereon, from the time the same was paid to him, and, &c.

Statement by *J. Glenn* filed, with his answer:—

1836, Aug. 9—To cash lent *A. Brown & Co.*,		$5866 34
Int. to 30th June 1843,		2425 58
		$8291 92
Deduct,		
3rd Sept., 1838—Paid *R. Johnson*,	$500 00	
Int. to 30th June 1843,	144 75	644 75
		$7647 17

The cause was then referred to the auditor, and the defendant, *Glenn*, deposited in court the balance above mentioned.

The auditor reported an account, in which he distributed the above sum among the heirs of *Samuel McKim*, a portion to the petitioners, with others, and he further reported, that an agreement was filed on the 3rd April 1837, for suspending over the payment of *Alexander McKim's* portion of the proceeds of sale, until the termination of a certain controversy therein mentioned, which does not appear, from the proceedings, to have been yet terminated; and that on the 17th September 1838, an order was passed, suspending the payment over of the net proceeds of the estate of the deceased, until further order, which has not yet been rescinded; and he submitted, that no part of the said fund in court be distributed, without further proceedings, and that the payment of the said *Alexander McKim's* portion thereof, be also suspended, according to the said agreement; and he further reports, that it appears from the answers of *John Scott* and *John Glenn, Esqs.*, the trustees, that the funds entrusted to them, for the purpose of investment, had been misapplied by the former; that the deficiency is evidently greater than any amount of fees that would be allowed, according to the usual course of the court, and the said trustees are answerable, each for the conduct of the other; no commissions have been for the present allowed.

The petitioners then filed another petition, suggesting the grounds on which the objections of the auditor, in reference to the suspending orders, might be dispensed with, and praying another reference to that officer, which was ordered on the 19th October 1843.

It was then admitted, by agreement, that *John Glenn* never united in any release of mortgage to *Luke Tiernan*, or his representatives, of the mortgage made to him and *John Scott*.

The auditor then filed another account, in which the two trustees were jointly charged with $10,695.48, as per their receipt of 30th July 1836, with $170.86 loaned, being so much above the amount entrusted to them by the answer of *John Glenn*, with various amounts of interest received, and credited with the sum of $7647.17, paid into court by *Glenn;* $500 paid to counsel, and commissions on the whole sum. The balance, $7232.75, was variously distributed among the heirs of *S. McKim;* a second account only distributed the money paid in by *Glenn*.

The appellant, *Glenn*, excepted to this audit, because it charged him with money received by *John Scott*, and with more money, $170,86, than was ever received to be invested; and because in one account, no commissions was allowed him.

It was then further admitted, that the property mortgaged by *Luke Tiernan* to *John Glenn* and *John Scott*, to secure the payment of the money belonging to the *McKim* estate, loaned by said *Glenn* and *Scott*, to said *Tiernan*, was amply sufficient for the purpose; that the moneys stated by *John Scott* to have been received by him, were so received by him in manner and under the circumstances stated in his answer, filed in this case, and that *John Glenn*, in no way, participated in receiving such money, or endorsing the note given for its security, or in releasing the mortgage; and it is agreed, that the last account stated and reported by the auditor, for the distribution of the money actually in court, shall be ratified, as stated.

The mortgage of the 1st August 1837, from *Luke Tiernan*, for $5000, to *Glenn* and *Scott*, as trustees, was also filed, with the release thereof, by *John Scott*, of the 2nd December 1841.

On the 3rd January 1844, other accounts were reported, in which the balance of $7232.75, was assumed to be still due from *Scott* to *Glenn*, and distributed differently from the former accounts, in consequence of the death of some of the heirs, and for other reasons.

To this account the appellant also filed exceptions; but on the 27th January 1844, the Chancellor, (BLAND,) ratified it, and ordered the trustees to pay accordingly; from which the said *Glenn* prosecuted this appeal.

The cause was argued before ARCHER, C J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By MEREDITH for the appellant.

The exception of the appellant to the auditor's account, as to $170 charged against him, must prevail. The charge is a clear mistake.

There was no original liability of the trustees, each for the other. *Glenn* did not select *Scott*, who was the attorney of the parties. This is an additional ground of defence for the appellant.

That the trustees were not originally liable for each other; and that fraud, mal-practice, is the ground of such liability; he cited: *Townley vs. Sherbone*, *Bridgman's Rep.*, 35. *Lewin on Trusts*, 136. 24 *Law Lib.*, 136. *Sadler vs. Hobbs*, 2 *Bro. C. R.*, 116, 117. *Townley vs. Chalenor*, *Cro. Chas*, 312. *Hardres*, 314. *Leigh vs. Barry*, 3 *Atk*, 584. *Williams vs. Nixon*, 2 *Beavan*, 472. *Littlehales vs. Gascoyne*, 3 *Bro. C. R.*, 74. *Hovey vs. Blakeman*, 4 *Ves.*, 596. *Bacon vs. Bacon*, 5 *Ves.*, 331. *Evans vs. Evans*, 1 *Dessau*, 520. *Knox vs. Pickett*, 4 *Dessau*, 92. *Sutherlend vs. Brush*, 7 *John. C. R.*, 22. *Lawrence vs. Lawrence*, *Lit. Select Cases*, 23. *Massey vs. Carlton*, 1 *Cheves*, 181. 1 *Iredell Eq.*, 93. *Gardner and Bowling vs. Harvey and Simms*, 12 *G. & J.*, 365, 384. *Walker vs. Symonds*, 3 *Swan*, 1. *Lewin on Trusts*, 24 *Law Lib.*, 140. *Brice vs. Stokes*, 11 *Ves.*, 319. *Langford vs. Gascoyne*, 11 *Ves.*, 335.

Joint executors and joint trustees, are exempt from all liability for each other, if merely passive, though with knowledge that his co-executor or trustee, has the funds. *Williams vs. Nixon*, 2 *Beavan*, 472. Where two executors were directed to invest and accumulate a surplus, one received the funds and misapplied it, the other, without knowledge, is not answerable. *Lenoir vs. Winn*, 4 *Dessau*, 65.

The general rule is, that one trustee is not liable for the default of his companion, nor is it error on his part, to permit his co-trustee to receive the funds of the trust.

If a trustee is not merely passive, but by some positive act, by direction or agreement, enables his co-trustee to get possession of the trust fund, then he is liable. *Clough vs. Bond*, 3 *Mylne & Craig*, 490. *Davis vs. Spurling*, 1 *Russ. & Mylne*, 66. *Gill vs. The Attorney General, Hardres*, 314. *Shipbrook vs. Hinchinbrook*, 11 *Ves.*, 252. *Same case*, 16 *Ves.*, 477. *Fox vs. Mackreth*, 2 *Bro. C. R.*, 400. *Underwood vs. Stevens*, 1 *Merriv*, 712. *Adair vs. Shaw*, 1 *Sch. & Lef.*, 272. *Joy vs. Campbell, Ib.*, 341. *Bone vs. Cooke*, 13 *Price*, 332. *Chambers vs. Minchin*, 7 *Ves.*, 186. 3 *Young & Collyer*, 359. *Clarke vs. Clarke*, 8 *Paige*, 153. *Monell vs. Monell*, 5 *J. C. R.*, 283. *Johnson vs. Johnson*, 2 *Hill*, 293.

If one trustee joins in a receipt, but receives no part, and shows the fact, the receipt itself does not impose any liability on him. *Fellows vs. Mitchell and Owen*, 1 *P. Wms.*, 81. *Churchill vs. Lady Hobson*, 1 *P. Wms.*, 241, each trustee is to account for what he has received. A trustee may passively let funds go into the hands of a co-trustee, but in any agreement with him, he makes himself responsible. The principle which protects a trustee from responsibility, when he joined in a receipt, and in fact received no part, was not originally applied to executors, on the ground, that as it is not necessary for the executor to join, interfering in the transaction unnecessarily, the inference is the other way. If he assumes a power over the fund, he is answerable in the particular transaction. *Churchill vs. Lady Hobson*, 1 *P. Wms.*, 241. *Brice vs. Stokes*, 11 *Ves.*, 324. *Harden vs. Parsons*, 1 *Eden*, 147. *Westley*

vs. Clarke, 1 *Eden*, 359. *Sadler vs. Hobbs*, 2 *Bro. C. R.*, 117. *Chambers vs. Minchin*, 7 *Ves.*, 198. *Shipbrook vs. Hinchinbrook*, 16 *Ves.*, 479. *Joy vs. Campbell*, 1 *Sch. & Lef.*, 344. *Mosely*, 35. 24 *Law Lib.*, 138.

The rule was attacked in 1 *P. Wms.*, 241, a distinction was taken applicable to executors, in relation to legatees and creditors. The principle was applied in relation to creditors, entitled to the utmost benefit of the law, against executors joining in a receipt. Each executor was made liable for the whole, but as to legatees, they had no remedy for their demand, but in equity.

In *Westley vs. Clarke*, 1 *Eden*, 245, the distinction between executors and trustees was doubted, and held, they stood on same ground with reference to receipts, if there is no other proof, as where one executor received mortgage money, and afterwards asked his co-executor to unite in a receipt and release. The act of the second deemed nugatory, one executor is competent to receive and release, and his acts are binding. In *Scurfield vs. Howes*, 3 *Bro. C. R.*, 94, *Lord Alvanley* doubted the distinction. In *Hovey vs. Blakeman*, 4 *Ves.*, 608, joining in a receipt was not held conclusive. There acting, as well as joining in a receipt. *Walker vs. Symonds*, 3 *Swan*, 64. 2 *Sto. Eq.*, *sec.* 1283. Joining in a receipt, is only *prima facie* evidence. *Monell vs. Monell*, 5 *John. C. R.*, 296. *McNair's Appeal*, 4 *Rawle. Rep.*, 148. Many exceptions have been introduced, but the true test is in *Townley vs. Sherbone*. Trustees are sometimes treated as bailees, and only responsible for negligence, evil practice, or fraud. *Knight vs. Earl of Plymouth*, 1 *Dicken*, 126. *Sto. on Bail*, 111. 2 *Ch. Cases*, 2. *Pybus vs. Smith*, 1 *Ves., Jr.*, 189. Trustees, who are mere stakeholders, not liable. *Balchin vs. Scott*, 2 *Ves.*, 677. It is like a gratuitous bailment.

The test of liability is this:—as a general rule, not bound for the acts and doings of each other,—if there is an absence of all fraud, and the exercise of reasonable diligence, no liability attaches. *Clough vs. Bond*, 3 *Mylne & Craig*, 490, 496. *Rowth vs. Howell*, 3 *Ves.*, 565. *Bacon vs. Bacon*, 5 *Ves.*, 331. Trustee dealt with funds as his own property, not

liable. *Adams vs. Claxton*, 6 *Ves.*, 225, 227. They are expected to take the same care of trust funds, as a reasonable attention to their own affairs would dictate to them, to take of their own property, and not more. *Massy vs. Banner*, 1 *Jaco. & Walk.*, 241. *Rainsfred vs. Rainsfred*, *Rice S. C. Eq. Rep.*, 343. *Hurtt vs. Fisher*, 1 *H. & G.*, 88. Trustees are responsible for gross negligence. *Mr. Glenn's* want of knowledge, now admitted by all, excuses him from *Mr. Scott's* default. Was there an exercise of due diligence on his part? He made no enquiry. He knew of the mortgage, that it was joint and ample; of *Mr. Scott's* relations to the parties in interest; that he was attorney, administrator for some; that he was "*dux et factotum*," entitled to large fees for extended labor. He knew the mortgage could not be released without him; that the executors of *Tiernan*, were cautious and prudent men; that the transaction could not be attacked for fraud; that the application of a third party, kept the fund locked up. There was, then, no want of diligence in relying securely upon the mortgage.

It was a trust fund, the representatives of *Tiernan* had notice of this when they took the release. The petitioners ought to follow the property for their indemnity. *Lewin on Trust*, 135. *Sinclair vs. Jackson*, 8 *Cow.*, 543. *Hawley vs. James*, 5 *Paige*, 323. *Murray vs. Lylburn*, 2 *J. C. R.*, 442. *Adams vs. Clifton*, 1 *Russ.*, 297.

If the executors of *Tiernan* had been made parties, what defence could they have set up? The court would have sheltered an innocent trustee. Then, what is there to prevent the remanding of this cause, with directions to make new parties, and seek relief against the mortgaged property?

By LATROBE for the appellee.

In this cause, there was more than one trustee in fact, yet, all are regarded by the courts as one. This might lead in some cases to injustice, if not controlled, to some extent, by the salutary discretion of the courts of equity. A recipient of a fund is alone responsible, except under peculiar circumstances. 2 *Story Eq.*, 652, *sec.* 1283. We start in this cause

with a joint receipt. The responsibility is to be regulated by that instrument. It attached at the time when the two trustees received the money. *Monell vs. Monell*, 5 *John. C. R.*, 295. 2 *Sto. Eq.*, 649. *Joy vs. Campbell*, 1 *Sch. & Lef.*, 341. The true question is, was the fund under the control of both parties? if so, both are chargeable. *Bridgeman*, 35. 7 *East*, 240. 1 *Dev. & Batt.*, 199. No cases have been cited, where the joint trustee has been discharged by equity; yet, in most of the cases, that trustee had not, in fact, received the money sought to be recovered. The fund, once in the hands of the trustee, and he remains responsible, while the security is ample and solvent. The cases, *Churchill vs. Lady Hobson*, 1 *P. Wms.*, 241; *Williams vs. Nixon*, 2 *Beav.*, 472, are the only exceptions.

The fraud of one trustee is, constructively, the fraud of the other; that is, he is liable for consequences, though innocent of the fact. How can the fraud of one, discharge a liability which has attached? The duty here, was for both trustees to invest and return the money into court, upon a certain event, which has long since transpired. Of that duty to return, the co-trustee was negligent. He let it pass, and did nothing. He did not attempt to recall the fund. A prudent man would have looked after it. The expiration of the mortgage, the death of debtor, and the end of a year from that death, at which epoch the administrator of the deceased debtor was bound to pay, were all cautions calculated to excite attention and promote diligence, and yet the trustee did nothing. After this, the fund was lost by payment to his associate trustee, since dead and insolvent. 24 *Law Lib.*, 140.

By Reverdy Johnson for the appellant, in reply.

The mortgage taken by the two trustees was a good security, for principal and all accruing interest. The object of the agreement was, to increase the fund, and secure both parties beyond the mere personal security of the trustees. The fund was to be placed beyond the hazard of loss by investment. What is the law of such a case? what the extent of the responsibility of *each* trustee? The general rule is not denied.

In the case of joint trustees, whether they do, or do not join in the receipt, there is no responsibility for each other, except for misconduct; when one, who has *not in fact received* the fund, is called upon to account, that fact must appear. The rule is founded on two grounds: on a general equity, that a trustee is not bound to answer for what he has not received; on public policy, that a more rigid principle would be too severe, too exacting, and thus the public would suffer, by excluding prudent men from a service where they are most essential. The principles are stated in *Bridgeman*, 35. 24 *Law Lib.*, 269, 271. There must be fraud, evil dealing, or mal-practice in the *non-receiving* trustee. It is no breach of trust to permit one of two trustees, to receive *all the profits* of an investment. *Ex parte Belchor vs. Parsons, Ambler*, 219. *Fellows vs. Mitchell*, 1 *P. Wms.*, 83. 2 *Sto. Eq.*, 1280, 1281. It was the opinion of that distinguished jurist, *Judge Storey*, that a joint trustee was only liable for his own acts and receipts; perhaps he was in error, as to difference in the rule touching executors and trustees in *England*.

The rule of irresponsibility, in favor of innocent trustees, is founded in justice. He ought never to suffer where he could not, ought not, to anticipate loss, and prevent loss. Any other doctrine would be against equity. Why does a joint receipt impose liability on all? Because all are blameable for some act done, or omitted to be done, under it. It supposes, that loss could not incur, unless blame on all. Possession of funds at sometime, during and under a trust, does not involve responsibility at all future time, while the trust continues. The fund was received in 1836; loaned by *both* to *Hunter*, on good security, and repaid. The whole principal was lent again to *Tiernan*, fairly, honestly and prudently. If the second loan had been refused, it would have been a *breach of duty*. Some calamity arises. The property depreciates in value. The trustees are not responsible for loss, yet, they received, and have not accounted. How are they to account? What they did, was in the course of duty, and it would be flagrant wrong to make them responsible for such a loss. The test is, what would a man of ordinary prudence and care, have done under the cir-

cumstances? The object was to make interest, the principal being well secured; the fund could not be used, by reason of intervening proceedings in chancery; it was locked up. In such a case, all prudent men would have awaited, until the court could act. But, for what he did not know, and, therefore, could not prevent, he was doing what the object, design, and intent of his appointment demanded.

The court will treat a faithful trustee, as liberally as they can.

The cases in *Ringgold vs. Ringgold*, 1 *Harr. & Gill*, 11. *Gardner and Bowling vs. Hardey and Simms*, 12 *Gill & John.*, 384. 1 *P. Wms.*, 241. *Bacon vs. Bacon*, 5 *Ves.*, 331, are all important causes on these questions, and this head of equity.

The item of $1350, was received by *Scott*, as counsel for *Joseph* and *Alexander McKim*, and this discharges *Glenn*. The $200 was borrowed by *Scott*, to whom fees were due out of the fund.

Compound interest will not be allowed, there was no direction to accumulate by re-investment.

Magruder, J., delivered the opinion of this court.

A decree of the Court of chancery, brought into that court a large sum of money, the proceeds of sale of the real estate of *Samuel McKim*, in order there to be distributed among the persons to whom the real estate descended. Before distribution was made, the title of some of the claimants to any share of the estate, and, of course, of the purchase money, was denied by others, who were admitted to be heirs of the intestate. Thus arose a controversy in chancery, about a considerable part of the fund, and the Chancellor having, by his order, excluded some of the claimants, an appeal was taken by them to the Court of Appeals. Shortly after this appeal, the parties litigant, by their counsel, entered into an agreement, (which it is admitted, had the sanction of the Chancellor,) "that *John Scott* and *John Glenn*, be constituted trustees, to receive and to invest that portion of the fund which was in controversy;" that a check, payable to their order, be drawn by the proper officer, and that "upon the final hearing of the said appeal,

the said *John Glenn* and *John Scott*, shall pay into the Court of chancery, the said sum of money, and all interest and profit which may accrue thereon, subject to the said order and decree, which may be passed on said appeal."

In pursuance of this arrangement, *Scott* and *Glenn*, on the 27th July 1836, received the money, and the manner in which they disposed of it, is fully set forth in the proceeding. It has never been alleged, that they did not invest it judiciously, and within a reasonable time.

At June term 1838, the Chancellor's order was affirmed by the Court of Appeals. No application, however, was made to the Chancellor, in regard to the distribution of this fund, by those to whom his order, (affirmed by the Court of Appeals,) gave it, until March 1843, when a petition was filed, by persons having an interest in the fund, requiring the trustees to account for the same. Thereupon, each of the trustees filed an answer, and by these answers it appeared, that *Scott* had misapplied a part of the fund; but, that with respect to *Glenn*, a payment, which he made into court, in compliance with the order, discharged him, unless he could be made responsible for the default of his co-trustee And, whether *Glenn*, the plaintiff in error, is responsible for such default of his co-trustee, is the principal enquiry upon this appeal?

The uncontroverted facts in this case, furnish all the answer that need to be given to very many of the authorities, on which reliance seems to have been placed. We need not remark upon the cases which instruct us, that a trustee is answerable for the default of his co-trustee, if, with a knowledge that the trust fund is in a course of abuse, that his co-trustee is making an improper use of it, he remains passive, refuses or declines to interfere. The case before us, is not one of that character. We need not notice the adjudications, which tell us, that if there be some mal-practice, fraud or evil dealing, then the one shall be answerable for the default of the other. To any of these, or such like cases, we have no occasion to refer, because, in the case before us, the trustee, whom it is attempted to make responsible for the default of his co-trustee, is nowhere charged with anything like fraud or collusion, or culpable omission of

duty. *Glenn* denies, upon oath, all knowledge of the receipt by *Scott;* of the money, afterwards wasted, and there is no statement or allegation, or intimation, from which it can be inferred, that he knew, or had any reason to suspect, that his co-trustee had abused, or was capable of abusing the trust reposed in him, and reposed in him, too, by the parties to whom the trust fund belonged, and most, if not all of whom, had confided their interests to him, as their solicitor.

The Chancellor, as a reason for making *Glenn* answerable, observes, that *Glenn* and *Scott* were, by the act of the court, founded on the agreement of the parties, judicially constituted joint trustees, and as such, jointly liable for the whole amount of the money so committed to their disposition.

It is apprehended, that whether this be considered a judicial appointment, or one made by the parties themselves, there is nothing in the case, or in the circumstances connected with this trust, which would authorise us to say, that *Glenn* was answerable for the default of *Scott*. Security might have been required of these trustees. It might have been insisted, that before the money was placed in their hands, they should give a joint bond with security, and thereby become security, each for the other; or, several bonds, the bond of each to be liable for the misconduct of the principal obligee in it. But, no bond at all was required by those who could have required it, and, surely, it does not follow, that each is answerable for the fidelity of the other, because, those who might have exacted security, think proper to dispense with it.

It is not perceived, that the case would be essentially different, if this was, strictly speaking, a judicial appointment; but, the order of the Chancellor, is in execution of the agreement of the parties, naming to him the persons who are to be entrusted with their funds. *Scott* was not selected by *Glenn* as his associate. In him, the parties who owned the fund, chose to repose confidence, and agreed to dispense, with security, for his good conduct. In the case of *Townley against Chalenor*, as reported in *Cro. Charles*, 312, it was resolved, that *Townley*, being but a party entrusted, shall not be answerable for more than came to his hands, and the reason assigned for this

resolution, was, "it was the default of him, who put them in trust, to repose trust in one who was unable to pay, and he being the party trusted, as well as *Townley*, *Townley* shall not be compellable to satisfy his defect." We have a more full report of the same case, (though the name of defendant is different,) in *Bridgeman's Reports*. There we are told, that in order to charge one trustee, for the defaults and deficiencies of their co-trustees, there must be proof, or circumstances to satisfy the court, that there had been *dolus malus*, or evil practice, fraud, or evil intent in him. It is true, indeed, as the lord keeper observed, that care should be taken, that trustees be not emboldened to break the trust imposed on them. It must be equally true, that parties trusted, ought not to be too much punished, lest it should dishearten men to take any trust, and all would be deterred from undertaking any trust; those only excepted, whose ignorance or knavery, render them unworthy of trust. *Scott*, the defaulter, was the trustee of the parties interested, chosen by them, and not by his co-trustee.

If we look at the circumstances connected with this trust, there is nothing to be found in them, which can operate at all to the prejudice of the plaintiff in error. *Scott* was a solicitor in the Court of chancery, and had the conduct of the original suit. He appeared in chancery and the Court of Appeals, for the successful parties, with power, it would seem, to secure such professional assistance as he might deem necessary; he was the agent of several, administered upon the estate of one of the owners of the fund, and had the orders of some of them, to receive the money to which they were entitled. It would be difficult, indeed, to prove, that if *Scott* had brought into court, all the money which he received, and there had been an order for the distribution of the fund, he had not undoubted power, to receive a larger portion of the fund than he wasted; that the solicitor and agent of the parties interested, could not have claimed more than is due from him, as trustee. Why, in such a case, should the plaintiff in error, be dealt with more severely than the trustee, was, in the very many cases, to be found in the authorities, wherein, the attempt to make one trustee or executor, answer for the default of the other, was unsuccessful?

In this case, the petition, let it be remembered, does not charge the plaintiff in error with fraud, collusion, or criminal remissness, and the parties to that petition, by submitting the case upon petition and answer, put it out of the power of the plaintiff, in this court, to deny or refute any specific charge. The question, in truth, is, whether there be in the answer itself, any admission or statement, which will authorise a Court of chancery, to make him responsible for any portion of the trust fund, admitted by his co-trustee to have been received by him, and for which he does not deny, that he is exclusively answerable?

The petitioners set forth their claim in these words: "But they are advised, that the said trustees are jointly accountable to them, as well for what they have actually made, by the employment of said funds, as also for what they might have made, but for any negligence or default committed by them, or either of them."

It would seem, that as the money, when received, and almost as soon as received, was judiciously invested, nothing more need to be said in regard to the claim, as stated by the petitioners themselves.

In the course of the argument, however, we have been referred to the receipt given to the register of the Court of chancery, which is proof positive, that the whole fund was, at the date of the receipt, in the hands of the plaintiff in error, and, therefore, it is contended, that he must be answerable for the whole. The argument would be entitled to much weight, and the authorities cited would be in point, if, after receiving the money, the plaintiff in error, had put it into the hands of his co-trustee, to make the investment, and instead of investing it, the co-trustee had applied it to his own uses. No doubt, the plaintiff in error, is bound to account for the money he received from the register, and he does give the most satisfactory account of it. He invested it, as he was bound to do. He parted with it, because it was his duty to part with it, and the case now is, precisely what it would have been, if the register had been directed not to pay the money to either of the trustees, but to the persons to whom it was loaned, upon such persons securing,

by mortgage, its repayment to the trustees. If the enquiry was, what the trustees did with the money, which was taken out of the Court of chancery, it is easily answered, and both of the trustees would be found to be blameless. The case before us, would not be different, if only one, and either of the trustees, had been allowed by the court to receive and invest the money. The money in controversy, was money due from *Tiernan*, the payment of which was secured by a mortgage, executed to the two trustees. Thus far, undeniably, the plaintiff in error, was not responsible for any part of it. But *Scott*, in the course of time, received and misapplied it. Of the receipt of it, the plaintiff in error, swears, (and it is not controverted,) that he was entirely ignorant. He did no act whatever, by which his co-trustee got the money, and left undone no act, which, if done, would have prevented the co-trustee from receiving it. Surely, if in such a case, the innocent trustee is to to be made answerable, it would be unreasonable to expect, that any prudent person could be prevailed upon to become one of two or more trustees.

It has been said, however, that by the terms of the loan, the money was due, and ought to have been collected; and, moreover, the appeal had been decided, and for that reason, the plaintiff in error, ought to have been prepared to pay it into chancery. There would be some plausibility in this, but for a fact which the record discloses, and which has not yet been noticed. The Chancellor, at the instance of a person, who claimed to be a creditor of the deceased, (*S. McKim*,) and for whose claim, if established, the land might be responsible, had passed an order, directing the trustees to retain the fund. How retain it? To be sure, they received the money, to invest it, *pendente lite*, between the real and pretended heirs, and the strict letter of the agreement, which placed the money in their hands, did seem to require, that they should be ready to bring it into chancery, upon the determination of that appeal. But, what was the obvious meaning of the agreement, upon which all parties acted? The money was to be invested, not to lie idle and unemployed in chancery, until chancery could distribute it. The appeal pending in the higher court, was spoken

of, because, at the time, it was the only obstacle to the distribution of the fund. It was not the duty or the right of the trustees, to prevent the money from yielding interest, while the court had not, from any cause whatever, the power of distributing it. The order of the Chancellor, passed at the instance of an alleged creditor of *Samuel McKim*, put it out of the power of that court to distribute it; and the obvious intent of the parties required, that the investment, for the sake of interest, should continue, until that order was revoked. After the petition was filed, and the answers were put in by the trustees, the auditor reported to the Chancellor, that the fund could not yet be distributed, because of the last order of the Chancellor. We thus ascertain, that up to the date of *Glenn's* answer, the money was, properly, bearing interest.

If there was any want of due diligence, in procuring a revocation of the order, who is to bear the blame of it? Surely not *Glenn*. With the creditor's suit, he had no concern, and over it could exercise no control. It may be, that the petitioners, themselves, who must have been parties to that suit, might have procured its revocation at an earlier period, and might have prevented a delay in the settlement of this trust, until the defaulting trustee was no longer able to bring into court, the trust money, which he had received.

It has been said, (and in many cases of trust, it should be remembered,) that co-trustees are bound to watch the conduct of each other; and in a former case in this court, it was stated to be the received doctrine, that if the trustee, "who wasted the estate, was in any degree facilitated therein, by the acts and omissions of the other, they are both equally liable." This doctrine, however, cannot prejudice the plaintiff in error. He, certainly, neither did, nor omitted to do anything, by which his co-trustee was, "in any degree, facilitated in wasting the estate." But, may there not have been, in the conduct of the defendants in error, something of which the plaintiff in error, may justly complain? May he not claim the benefit of the maxim, *vigilantibus non dormientibus leges subserviunt?* So far as we can judge, it was owing to them entirely, owing to their remissness, in procuring a revocation of the Chancellor's

order, before spoken of; that the default of *Scott* remained a secret, until he became insolvent, and it may be until his death, gives to others a right to claim the portion of the fund to which he was entitled, as administrator of one of the claimants, if in no other character. Add to this, the statement in *Scott's* answer, relative to the fees, which were justly due to him, for his services in these suits, and it must be believed, that while the plaintiff in error, has possibly been injured, it is by no means clear, that the defendants in error, or some of them, will not profit by *sleeping upon their rights.*

The money was lent to *Tiernan*, it is said, upon a short credit, and ought, when it became due, to have been collected by plaintiff in error. To this an answer may be given in a few words: The credit was necessarily for a short period, because, in a short time, the Chancery court might have been, and it was supposed would have been, able to distribute the fund. But the money was to be invested, and to bear interest, until it could be distributed, and it was an advantage to all parties, that another investment should not be necessary. The debtor might insist on paying the debt, and if he had, the trustees would have been bound to receive it, *and again invest it.* If therefore the debtor did not offer to pay it to the trustee, there was no want of due diligence, in his forbearing to ask for payment.

We do not think that the plaintiff in error, ought to be charged with the money, which his co-trustee received from *Tiernan*, and his representatives.

Other questions were argued in connection with this, in which persons, not parties to this suit, are interested. Upon these we cannot intimate an opinion. We can only say, that the plaintiff in error, is not responsible for the money in dispute; of course he is not chargeable with interest on it.

With respect to the sum of $170.86, paid into chancery by the plaintiff in error, over and above the sum with which he was chargeable, the court can perceive no reason for refusing to return it. It cannot be retained on the assumption, that it had been received "on some investment *not specified.*" This also is error.

The sum allowed to *R. Johnson, Esq.*, has not been objected to, and of course must be allowed, without interest.

With respect to the credit of $300, which is claimed as so much paid to *Scott* for professional services, and also the credit of $1350, which is claimed, it does not appear to this court that the plaintiff in error had authority to pay them out of the trust fund, or that he can claim a credit for them in the settlement of his account as trustee. The commission allowed to this trustee is correct.

The order of the Chancellor, dated 26th January 1842, will be reversed, with costs, and the case to be remanded to chancery, in order that the account of *John Glenn*, as trustee, may be stated as herein directed, and that such further order be taken in the case as any of the parties interested may apply for.

DECREE REVERSED AND CAUSE REMANDED.

THE STATE OF MARYLAND, USE OF JOHN T. BOONE, *vs.* WILLIAM BRYAN, OF RICHARD, EX'R OF JOSEPH N. BURCH, JR.—*December* 1845.

Where an action was brought on the administration bond of *L B's* estate, for the use of *J*, and in the progress of the cause, the plaintiff asked leave to strike out the use, and enter the cause, for the use of the *administrator de bonis non* of *L B*, who proposed to claim an unadministered balance of money in the hands of the first administrators, and tendered a replication to that effect; the county court overruled the motion, from which the plaintiff entered an appeal on the record. After this, the plaintiff being called to join in demurrer with the defendant, made default, and a *non suit* was entered against him. HELD, that an appeal did not lie.

APPEAL from *Prince George's* county court.

This was an action of *debt*, commenced on the 26th September 1842, by the appellant against the appellee, who declared upon the bond of *S. Townshend, Joseph N. Burch, Jr.*, and others, of the 18th December 1830, conditioned, that *S. T.*, and *Maria Boone*, should perform the office of administrator, and administratrix, of *Levin Boone*, deceased. After oyer, the defendant pleaded:—

1. That the said *J. N. B., Jr.*, in his lifetime, from the time of the making of the said notes, to the time of his decease, performed everything in the condition aforesaid, mentioned, on the part of the said *J. N. B., Jr.*, to be performed and kept, &c.

2. *Plene administravit*, of the assets of *J. N. B., Jr.*, by the defendant, before the impetration of the writ original in this cause.

The plaintiff replied to the 1st plea, showing that *John T. Boone*, for whose use the writ was entered, was the residuary legatee, under the will of *Levin Boone*, and entitled to, &c., which the administrators were bound to pay, and had not paid, and traversed the 2nd plea.

The defendant, by his rejoinder, specially denied all the facts of the plaintiff's first replication; and tendered an issue to the country on the second replication, in which the plaintiff joined.

The defendant, then, also demurred generally to the replication of the plaintiff, in which demurrer the plaintiff joined, and, then, upon motion, had leave to withdraw his joinder in demurrer, which he did.

The plaintiff then moved the court to strike out the use of *J. T. B.*, and to enter this cause, for the use of *W. H. Tuck, a. d. b. n.* of *Levin Boone*, with the will annexed; and for leave to amend his pleadings, for the purpose of filing an amended replication. The breach assigned in this latter plea, was, that in April 1837, *S. T.* and *M. B.*, as administrators of *Levin Boone*, passed an account of the said administration, by which there remained due to the estate of *L. B.*, the sum of $907.82, and that the said administrators died, without completing their administration, or proceeding further therein, leaving debts and legacies unpaid, to the amount of $1000, and still due and unpaid; that letters *d. b. n.*, had been granted to the said *W. H. Tuck*, &c., on the estate of *L. B.* The said *W. H. T.*, also tendered a replication to the plea of *plene administravit*, which he traversed.

The court overruled the motion, and the plaintiff appealed.

The defendant then prayed the court, that the plaintiff might

join in his demurrer to the replication of the plaintiff, which the court directed, and "the plaintiff being solemnly required, comes not, neither is its writ of the State of *Maryland* further prosecuted, but makes default."

The county court then rendered judgment, that the plaintiff take nothing by its said writ, but that it be in mercy, &c., and for costs, from which judgment the plaintiff appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By W. H. TUCK for appellant.

This suit was brought on the bond of *Maria Boone* and *Singleton Townshend*, as administrators of *Levin Boone*, by residuary legatee, under his will, to recover the balance appearing to be due the estate, by the settlements in the Orphans court, the appellee's testator, *Joseph N. Burch*, being one of the sureties on the bond. The defendant pleaded performance and *plene administravit*. The plaintiff replied, setting forth the death of *Levin Boone;* the claim of *John Boone* under his will; the amount of the property that had come to the hands of the administrators; the balance due the estate, &c.; and averring a sufficiency of assets in the hands of the defendant to pay the claim. The defendant rejoined, denying the averments of the replication, and also filed a demurrer, to which there was a joinder by plaintiff.

At this stage of the pleadings, the plaintiff asked leave to withdraw the joinder in demurrer, which was granted. The plaintiff then moved the court to strike out the use of *John T. Boone*, and to enter the cause, for the use of *Wm. H. Tuck, administrator de bonis non cui testamento annexo,* of said *Levin Boone;* and for leave to amend the pleadings, for the purpose of filing an amended replication. This replication sets out:—

1st. The death of *Levin Boone;* the appointment and qualification of his administrators; the amount of estate that came to their hands; the balance due the estate on their settlement

with the court; their death, leaving this balance unadministered; the granting of letters *de bonis non*, to *W. H. Tuck;* and that said balance is payable to him, as unadministered assets of the deceased, &c.; and

2nd. That the defendant had assets of his testator to pay this claim.

The court overruled this motion, and *non prossed* the case, under a rule upon plaintiff to join in the defendant's demurrer. The plaintiff appealed, and will contend:—

1st. That the *administrator de bonis non*, was entitled to sue the bond, and should have been substituted as *cestui que use*, in the place of *John T. Boone*.

2nd. That the amended replication, being offered in connection with the motion to change the use, and shewing the right of the *administrator de bonis non* to sue, the amendment should have been allowed.

The act of 1798, chap. 101, sub chap. 14, sec. 2, confined the administration *de bonis non*, to "assets not converted into money, and not distributed or delivered, or retained by the former administrator under the court's direction." The act of 1820, chap. 174, sec. 3, enlarges the powers and duties of *administrators de bonis non*, and extends them, in effect, to every other description of property belonging to the deceased's estate, at the death of the first administrator, whether it consist of bonds, notes, accounts, evidence of debt or money; and authorises the *administrator de bonis non* to sue the bond of his predecessor, for their recovery.

The replication filed, in connection with the motion to change the use, shews, that all the property of the deceased was sold by the first administrators, and that no final account was passed on his estate. Whether the proceeds remained in their hands, in bonds or notes, or in money, the amount was payable to the *administrator de bonis non*. It is obvious, under this act, that he is the proper person to receive and disburse these outstanding assets, whether they be payable ultimately to creditors or legatees, and that the bond may be sued for his use, all questions of fact, of course, being reserved for trial upon the pleadings.

The next enquiry is, whether there was error in the court's refusal to change the use? The general rule is, that a public bond may be sued by any person interested in the recovery. *Kiersted et al., vs. State, use Sundry Persons*, 1 *Gill & John.*, 231, and the cases there cited. The same principle is recognised in the case of the *State vs. Dorsey et al.*, 3 *Gill & John.*, 75. In that case, a suit was commenced in the name of the State, for the use of the levy court of *Baltimore* county. Pending the action, that court became extinct, and another corporation was created in its stead. This fact was pleaded in bar of the action. The court, in their opinion, assimilate the case to a suit on a private bond, entered for the use of a third person. They say, "we can perceive no reason why, in the case of a public bond, with the privilege secured to any person interested to bring suit upon it, there should be any difference. In either case, the suit must be in the name of the obligee." "There is no necessity, for the purposes of the suit, to enter the use, whether it is brought for the benefit of an individual or a corporation; nor, if entered, does it make any difference to the defendant how it may vary or change, as to the person asserting the same right. It does not affect his defence, nor can any change of the use become a fit subject of plea. The declaration or replication assigns the breach, and discloses the use, or for what the suit is brought, and the defendant being thus advised, makes his defence accordingly. The judgment is in the name of the State, and will be for the use of whoever is entitled to the beneficial interest."

The appellant contends, that this authority is conclusive. The cases, in principle, are the same, though the question is raised in a different form. In that case it was presented by plea;—here it arises on motion. But with this the defendant has no concern. He must look to the State as the legal plaintiff. The *cestui que use* is not considered a party to the action, for any purpose, except as a security for costs. The defendant could not be taken by surprise. The court would not allow that. For if the motion had been granted, and the use entered, the court would have continued the cause, or granted time for the defence. It is not contended, that mere

amendments of pleadings are proper subjects of appeal. But in this case, the replication was filed with the motion to strike out and change the use, for the purpose of shewing the court, that the *administrator de bonis non* had an interest in the bond, and might put it in suit; or avail himself of the pending action, as being "entitled to the beneficial interest;" and not being denied, or in any manner called in question in the court below, it must, itself, be considered as evidence of all it contains. It must be conceded, that the law of amendments in pleading, was administered with unusual vigor in this case. *Mr. Evans*, in his work on *Practice*, page 248, says: "Modern judges lean so universally in favor of amendments, that we scarce remember a question made, whether an amendment was proper, except in the case just mentioned; and none in modern times, in which the amendment was not permitted." The plaintiff first filed a replication, proposing to recover on the interest that *John T. Boone* was supposed to have in the estate of *Levin Boone*. On the argument of the demurrer to that replication, the court intimated, that *John T. Boone* had no title; but that the right to sue, was in the *administrator de bonis non*. The plaintiff having withdrawn the joinder in the demurrer, moved to substitute the *administrator de bonis non*, as the equitable plaintiff, and to be permitted to conduct the pleadings according to the interest of the administrator. This the court refused, because the suit was not brought in the name of the State, for the use of the *administrator de bonis non*. Now, if the motion had been granted, and the case had gone ultimately against the defendant, the propriety of changing the use, with all other questions on the record, might have been revised on his appeal. But, by refusing the motion, the court summarily decide the whole controversy, and adjudge, that the State cannot prosecute the case for the use of any person, but the first *cestui que use*. If it is the entry of the use, and not the assignment of the breaches, that shews the right to sue; and if a person cannot recover as beneficial plaintiff, unless the use be entered when the writ issues, it follows, that if no use be entered at that time, no recovery can be had in that suit. This is certainly a conclusion against the opinion in *State vs.*

Dorsey et al., 3 *G. & J.*, 93, where it is said, the use need not be entered at all. Two suits for greater caution might have been instituted at the same time, one in the name of the State, for the use of *Boone*, as legatee, and the other for the use of the *administrator de bonis non*. But it is more convenient and less vexatious, to have one suit in which the pleadings may be so varied, as to allow a recovery in any aspect in which the State may shew a right to recover. And since the decision of the case of *State vs. Dorsey et al.*, there can be no objection successfully made to this course, for there the writ issued for the use of one corporation, and judgment was rendered for the use of another. This is more than a question of amendment of the pleadings. The motion to change the use, was the only mode in which the rights of the *administrator de bonis non* could be brought before the court. It involved the question of his right to sue the bond, and when decided for the defendant, the case was gone. Any judgment which finally disposes of the case, and settles the right of a party to recover, is the proper subject of appeal, whether the decision be for or against the recovery. When the motion was overruled, the case stood as if there had been no joinder in the demurrer. The State was laid under a rule joinder, and for not complying, judgment of *non pross.* was entered. If the plaintiff had joined again in the demurrer, it would have been, in the face of the intimation of the court, against the right of *John T. Boone* to sue the bond; so that the only remedy was an appeal from this judgment on a new suit on the bond, for the use of the *administrator de bonis non*. Relying on the case in 3 *G. & J.*, 75, the appellant preferred the appeal to a second suit on the bond, then barred by limitations.

It is submitted, that the court will reverse the judgment of *non pross.*, and the judgment rejecting the motion to change the use, &c., as made by the appellant, and send the cause to the county court on a *procedendo*.

The record seems to shew, that the defendant rejoined and demurred to the replication at the same time. This is evidently a mistake in the record. The defendant must have withdrawn his rejoinder before he entered the demurrer. I have no distinct recollection of the fact, but such is my impression.

By T. S. ALEXANDER for the appellee.

The writ, in this case, was issued in the name of the State of *Maryland*, endorsed at the instance and for the use of *John T. Boone*, against the executor of a surety for *Singleton Townshend* and *Maria Boone*, on the bond given by them for the performance of their duties as administrators, with the will annexed, of *Levin Boone*, deceased. The replication to the plea of general performance states, that the testator bequeathed the residue of his estate to his wife, the said *Maria Boone*, for life; and after her death, to *George Boone* and *Nicholas Boone*, to be equally divided between them, and to the heirs lawfully begotten of their bodies; and for want of such heirs, to *William Boone* and *John Boone*, and their heirs and assigns, as tenants in common. That *George Boone* and *Nicholas Boone*, died in the life time of *Maria Boone*, without heirs of their bodies; and that *William Boone*, also, died without issue; whereby the said residue devolved on the said *John*, at whose instance and for whose use this action is brought. That the goods and chattels of the testator in the hands of his administrators, after payment of all debts and particular legacies, amounted to the sum of $1000; which was distributable to the said *Maria Boone*; and that the said *Maria* has lately died. And the breach assigned, is the non-payment of that residue to the said *John*. The defendant demurred to this replication. And thereupon the plaintiff moved the court, "to strike out the use of *John T. Boone*, and to enter this cause for the use of *William H. Tuck*, *administrator de bonis non*, with the will annexed, of the deceased *Levin Boone*," and for leave to amend "the replication, by stating in substance, that the original administrators had sold the personal estate of their testator, "and had passed an account of their administration; by which there remained due to the said estate, after allowing certain disbursements, the sum of $907.02;" and that the said original administrators died, "without completing their administration, or proceeding further therein, after passing said account, and leaving unadministered the said balance; and leaving debts and legacies unpaid to the amount of $1000."

The court overruled the motion, and the plaintiff appealed from said decision.

Whereupon the defendant prays, the plaintiff may be required to join in demurrer with him. The rule was accordingly laid. But, "the said plaintiff being solemnly called, comes not, neither is its writ, aforesaid, against the said defendant further prosecuted; but makes default."

A judgment of *non suit* is therefore entered, and the plaintiff appeals from this judgment.

This case is therefore before this court, on appeals from two distinct judgments; the one interlocutory, overruling the motion to amend the writ and replication; and the other final, entering judgment of *non suit*. And the question is, whether in the rendering of those judgments, or either of them, there is error, which may be corrected on those appeals, or either of them?

On an appeal from a judgment of *non suit*, the appellant cannot complain of error in the original record. He is required to shew mistake in entering up the judgment. 2 *Bing.* 326. *Evans vs. Sweet, in* 9 *Engl. Com. Law Rep.* 420. And in *Kempland vs. Macauley*, 4 *T. R.* 436, where a writ of error was brought on a judgment of *non-suit*, *Buller*, justice, remarked, "here it is apparent, that there can be no error, of which the plaintiff can avail himself: for if the record were manifestly erroneous, the plaintiff, who has made default by suffering a *non suit*, can never have a judgment afterwards in his favor." In this State, since the act of 1825, *chap.* 117, error in the judgment is to be shewn, only where it has been entered after demurrer, or motion in arrest of judgment. 5 G. & J., 102, *Sasscer vs. Walker*. No point or question relating to, or involved in the final judgment of *non suit*, is presented by the record, shewing the default of the plaintiff. Hence it may be affirmed with confidence, that in this State no appeal will lie from a judgment of *non suit*.

2. If an appeal will lie from a judgment of *non suit*, it is clear, upon the preceding authorities, that the appellant must shew error in the proceedings anterior to the judgment, and on which the judgment was founded. He must show there was no legal default on the part of the plaintiff. For the existence of default is the only point concluded by the judgment.

Now in this case, the record states, that being solemnly called, the plaintiff came not; but made default. And therefore it was considered, that it take nothing by its writ. The record is conclusive, that the plaintiff was called, and did make default; and the judgment was entered, because of the failure of the plaintiff to answer when solemnly called. In this, as in every other stage of the cause before verdict, the plaintiff has the option of abandoning his suit. The plaintiff determined his option, by standing mute when regularly required to speak. The judgment, then, was the legal effect of his own voluntary act.

The argument filed on the part of the appellant, attempts to connect the judgment of *non suit*, with the anterior proceedings. And because he could not answer the law of the demurrer, and the court would not permit an amendment of the pleadings, it is supposed, the plaintiff had no other alternative but to *non suit* his action. This is not so; he might have joined in demurrer. If the judgment had been against him, and if the refusal of the court below to permit an amendment, may be reviewed in this court, then, by an appeal from the judgment on demurrer, he might have corrected all errors, not only in the judgment itself, but in the refusal of the court to permit the proposed amendment; and likewise, in all other anterior proceedings. This ought to have been his course, if he intended to question the proceedings of the court below. I have already said, that he had the option of submitting to a *non suit*. If he had permitted a judgment to be entered against him on demurrer, he must, as an equivalent for his chance of reversing that judgment, have given to the defendant an equal chance of concluding further litigation by affirming the judgment. By submitting to a *non suit*, he retained his right to commence a new action. Thus it appears, that the *non suit* was the consequence of a proceeding on the part of the plaintiff, advisedly adopted:—adopted with the view of avoiding the evil of an unfavorable judgment against him on this record. He withdrew his cause from the court below, voluntarily, for the purpose, it may be, of renewing the litigation in another form. Is he at liberty to retract his election? Or can he impose on this appel-

late jurisdiction, the duty of determining questions, on which no judgment was pronounced by the court below?

Let us again assume the judgment was entered, because of the failure of the plaintiff to join in demurrer, in compliance with the rule laid for that purpose. His default, in fact, will be established by the record. And the only subject for enquiry, will be, whether the rule was regularly laid? It was a regular sequence from the demurrer; unless the progress of the action was intercepted, by the entry of the appeal from the judgment, overruling the plaintiff's motion to amend. To that appeal, as a supersedeas, there are two conclusive objections: *First*, the judgment was interlocutory; and from an interlocutory judgment no appeal will lie. The appeal was, therefore, to say the least of it, premature. *Second*, no bond was given to prosecute that appeal; and a bond is necessary to stay execution, even of a final judgment. Either of those reasons would be sufficient to show, that the cause was to progress after the appeal, in the same manner, precisely, as if no appeal had been entered.

Again, let us associate the judgment of *non suit*, with the refusal of the court to permit an amendment of the pleadings. Was there error in such refusal, which this court may correct?

I insist:—1st. That an appeal will not lie, in any case, from the refusal of the court below to allow an amendment. 2d. That in this particular case, the court acted rightly, in overruling the motion made for amendment.

1. The motion for amendment is addressed to the discretion of the court of original jurisdiction; and it is a general rule, that the discretion of the inferior court is not to be controlled on appeal. An appeal will not lie, from an order granting or refusing a new trial. 5 *H. & G.*, 174, *Anderson vs. the State*. 2 *H. & G.*, 79, *Wall vs. Wall*. Nor from the refusal of the court to strike out a judgment by default. 6 *H. & J.*, 151, *Hawkins vs. Jackson*. Or grant a continuance. 6 *Cranch*, 206, *Marine Ins. Co. vs. Hodgson*. Nor the allowance or disallowance of an amendment. 11 *Wheat.*, 280, *Chirac vs. Reinecker*. Other cases, illustrative of the general rule, may be found collected in 2 *United States Digest*, 160. It is conceded by the argument filed on the other side, that the refusal of

the court to allow an amendment, is not, ordinarily, a subject of appeal. But this case is supposed to be taken out of the operation of the general rule, by the circumstance, that the motion was accompanied by a replication, which showed another title in some other person, to commence another action on the same bond. The peculiar fitness of this argument, as the basis of an exception to the general rule, is not perceived. No injury was done to this other person by rejecting his application; since, by his own showing, he may put the bond in suit for his own benefit. In every instance, the amendment is to be allowed for advancement of justice. In every case, the court may require to be informed, of the particulars of the amendment, and of the probability of sustaining the amended case by evidence. And where such statement is not called for, it ought to be assumed, that the motion to amend involves a grave question of law. There is not, therefore, such peculiarity in the present case, as is suggested. In *Anderson vs. The State*, the motion for a new trial was founded on a supposed misdirection of the court to the jury. But the appeal was dismissed. A yet stronger case was brought up, some years ago, from *Charles* county. The defendant, I believe, excepted to an opinion, expressed by the court during the trial. The verdict being against him, he moved for a new trial, on some ground connected with the conduct of the jury. The court refused to entertain the motion, unless he would abandon his exception. He appealed. His counsel here, admitting, that an appeal would not ordinarily lie, from the refusal of the court below to grant a new trial, insisted, that the court was bound to receive and consider his motion; that the *Constitution* secured to him the benefit of a *fair* trial by an *impartial* jury; and that if he considered himself aggrieved by the ignorance or partiality of the jury, it was the bounden duty of the court to *listen* to a temperate statement of his grievance. The error assigned in this case, was not in the exercise of discretion by the court below, but in its refusal to excercise its discretion. And, I presume no one would hesitate to say, that the conduct, or rather, misconduct of the court, was flagrant and inexcusable. Yet this court held, it was incompetent to administer

relief. The whole jurisdiction over the subject, was confided to the county court, and with the exercise, or refusal to exercise its discretion, this court could not interfere. Now the case to which I refer, is infinitely stronger than the case before the court. In the former case it is clear, that a constitutional right of the suitor was violated; a constitutional duty of the court was disregarded. In the present case, there is nothing to show that the court below did not exercise a sound judicial discretion, in refusing the proposed amendment.

2. Let us assume, that the refusal of the court to suffer the amendment, is a proper subject for revision, and that the record discloses all the facts and circumstances, by which the correctness of the decision of the court below, is to be tested. Is there error in that decision upon the record?

In this country amendments are liberally allowed, more so than in *England*. But there must be some limits, beyond which, an amendment cannot be extended. In an action brought by *A* against *B*, there cannot be an amendment, which would warrant a judgment in favor of *C* against *D*. And in an action of ejectment, it would be against principle to admit the lessor of the plaintiff to recover damages for an *assumpsit*. The act of 1809, *chap.* 153, to which our practice is to be traced, allows such amendments, as may bring the merits of the question between the parties fairly to trial. The parties are not to be changed; nor can the question be changed. Such modifications of the pleadings, and other proceedings are to be allowed, as will fairly present the original question, as between the original parties. The original writ cannot be amended. It is not a part of the pleadings, nor of those other proceedings, which may be amended under the provisions of the above act. To alter the writ would be to alter the question between the parties, 7 *H. & J.* 257, *Stoddert vs. Newman;* and therefore, where the party originally founded his cause of action on a testamentary bond, he was not permitted to amend, by relying on a guardian's bond. 4 *Gill & Johns.*, 385, *State vs. Green.*

Assuming then, that the person at whose instance, and for whose use the action is brought, is the party plaintiff; and that

the replication discloses the question to be tried, it would be against principle, and the provisions of the act of 1809, to admit the substitution of another *cestui que use*, claiming under another title. To avoid this conclusion, it is argued, that the State is the party plaintiff, and that the writ discloses the question at issue between the parties. If this was so, then one recovery on the testamentary bond would bar any other action on the same bond; which is against experience. Again, we are told that there is a complete analogy between the case of an action on a private bond, brought in the name of the obligee, for the use of another, and of an action on a testamentary bond, brought in the name of the State, for the use of a legatee, or other party interested in the administration; and that as the use entered in the one case may be altered or amended, pending suit, without prejudice to the plaintiff's right of recovery, a like alteration may be made in the other case. These positions derive color from *dicta*, which are to be found in the opinion of the late chief judge, in 3 *Gill & Johns.* 75, *State vs. Dorsey*. It is the exclusive province of this court to determine, how far it is bound by opinions expressed by the judge, charged to deliver its judgment, where such opinions are not material to the judgment, or are used for illustration and argument merely. We have high authority for affirming, that "an opinion given in court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary opinion had been broached, is no judicial opinion." If I can show then that the *dicta* relied on, were not called for by the circumstances of the case, and were unnecessary to the determination of the points which were really before the court, I may, without the imputation of intentional disrespect to this court, venture to state the ground on which I would question the authority of those *dicta*. *Vide, Ram on Legal Judgment*, 36. What then was the question in the case of the *State vs. Dorsey?* An action had been brought on a collector's bond in the name of the State, at the instance and for the use of the levy court of *Baltimore* county, at that time the fiscal representative of the county; and the members of which were appointed by the executive. Pending

the suit, an act was passed changing the name of the levy court, into that of commissioners of *Baltimore* county; and transferring the power of appointing commissioners from the executive to the people. The question was, whether the suit could be continued by the commissioners? And the affirmative of this question was to be sustained, by showing, that the commissioners were, in law, identical with the levy court—succeeding to the same functions, rights, and liabilities; and enforcing the same legal title, for the benefit of the same constituency. They were the successors of the levy court, in being at the time the action was brought; bearing to the levy court a relation as intimate, at the least, as the heir to his ancestor, or the executor to his testator Here was the argument conclusive on the subject. All therefore, that ensues, in relation to the analogy between an action brought on a private bond, in the name of the obligee for the use of another, and an action brought on a testamentary bond for the use of one interested in the administration; and to the necessity for and the effect of an entry of the use, are mere *prolata*, not concluding to the judgment, or material to its correctness.

I shall now proceed to show, that whilst there may be points of agreement between the two cases, there are also points of difference; and that the learned judge in his opinion quoted by the other side, has not expressed himself with his accustomed caution and accuracy. In the first place, the learned judge is in error, in supposing there is similarity in the nature of the interest to the *cestui que uses* in the two cases. An assignment of a private bond, conveys no legal interest to the assignee. It operates, simply as a power irrevocable, to the assignee to receive the money; and to sue in the name of the obligee for its recovery. There is no law requiring the use to be entered on the docket or record; and the entry is only made as notice to all parties of the beneficial interest of the assignee. It is, by motion, addressed to the equity of the court, that the rights of the assignee are enforced. On the other hand, the act of 1798, chap. 101, confers on the party, aggrieved by the conduct of the executor, a legal right to put his bond in suit. And the act of 1794, chap. 54, sec. 10, directs the clerk,

before issuing the writ (in any suit on a testamentary bond,) to endorse thereon the name of the party, at whose instance, and for whose use the suit is instituted. The endorsement of the use is thus made a part of the writ. A writ issued by the clerk, without the endorsement, would be merely void, or at the least voidable, as irregularly issued. It is incorrect therefore to say, that "there is no necessity for the purposes of the suit to enter the use." The duty is imperative.

Again, the learned judge is in error, in running parallels between the form and effect of the proceeding in the two cases. And first, as to form. In the case of a private bond assigned, the writ issues in the name of the obligee; the declaration counts on his title, and the pleas attempt to bar his title. The assignment is not noticed in any part of the record. Payment to the assignee must be pleaded as a payment to the obligee. A release by the assignee, could not be pleaded at all. In the case of a testamentary bond, the declaration or replication must show title in the person, at whose instance and for whose use the action is brought; and every plea or rejoinder affects to bar that title. In every stage of the pleading, the title of the *cestui que use*, (improperly so called,) is affirmed or denied. The title of the State, is recognised as technical only. Then, again, as to the effect. To an action on a private bond by the obligee, for the use of *A*, the defendant may plead a recovery in an action, formerly brought by the obligee, simply, or for the use of *B*. A recovery, in one action, concludes the question of title, and extinguishes the right of action in the bond. But a recovery on a testamentary bond, in the name of the State, at the instance and for the use of *A*, cannot be pleaded in bar of a second action on the same bond, in the name of the State, at the instance and for the use of *B*. Nay, a recovery by *A*, counting on his title as a creditor, would not bar a second action on the same bond, in which he would count on his title as legatee. A recovery on a testamentary bond, concludes only the person at whose instance, and for whose use, the action was brought, and in respect only of the title in question, by the pleadings in that action. With this brief explanation of the grounds of objection to the *dicta*, expressed by

the learned judge, in 3 *Gill & John.*, I conclude, that in an action on a testamentary bond, the endorsement is an essential part of the writ; that the person, at whose instance, and for whose use the action is brought, is the party plaintiff; that the title of that person, as disclosed by the pleadings, is the question at issue between the parties; and, consequently, that the act of 1809, neither authorises nor allows a substitution of one name for another in the endorsement of the writ, nor an amendment of the pleadings, for the purpose of raising a new question on a title, in which the person, at whose instance, and for whose use the writ was issued, has no interest.

I have thus attempted to show, that the court had no authority to allow the amendment asked for. I will next endeavor to prove, that the authority, if it existed, ought not to have been exercised. Every suit brought, should have a definite object. The plaintiff should state his cause of action with such certainty, as to enable the defendant to decide, whether he would admit or contest it. It would be wrong to permit the plaintiff to bring his neighbor to answer one charge, which is groundless, and then recover against him for a cause, which perhaps, he would not have denied. Whatever may be our practice in this respect, there must, in principle, be some limit to this right of amendment. If it can be shown, that the action was really brought to recover a bond for $500, given in 1840, would it be right to permit the plaintiff to recover on a bond for $1000, given in 1842? After the defendant has successfully defended himself against *Boone*, at whose instance, and for whose use the suit was brought, would it be right to subject him to further litigation in this same suit, at the instigation of *Tuck*, who claims a distinct right in a different character? *Boone*, as residuary legatee, claims the clear balance remaining, after a complete administration. *Tuck*, as administrator, claims the proceeds of the estate, as in the hands of the original administrators, unadministered. It is not even shown, that *Boone* has any beneficial interest in the result of *Tuck's* action. On the contrary it is averred, that the debts and particular legacies outstanding, will absorb the entire estate. A suit brought by *Boone*, in his own right, and for his own

benefit, is, therefore, to be continued by *Tuck*, for the benefit of other persons. Is there equity in this demand, in respect either of *Boone* or the defendant? Will the court say, that our right to recover the costs incurred by us, in resisting *Boone's* claim, shall abide the event of the new litigation in which we are to be engaged with *Tuck*? Or, in the event of our ultimate recovery, will the court restrain us from levying our entire costs from *Boone*?

If this court is to revise the discretion of the county court, it will notice every circumstance which may have influenced the judgment of the court below. It will notice that *Mr. Tuck*, the present *administrator de bonis non*, was the attorney who sued out the original writ, for the benefit of *Boone*. We have the guarantee of his established character, that the writ was advisedly issued, and after evidence, satisfactory to him, that the estate had been duly administered. Is it possible that he, being the *administrator de bonis non* at the time, would have yielded the right to *Boone*, without due examination? If the force of this inquiry is sought to be evaded by the suggestion, that his letters were granted after the commencement of this suit, I reply, that the title which is to continue this action, must have existed at the time the action was commenced. My own suspicion is, that the letters were granted after commencement of this suit, and after the court had decided, that the residue vested in interest and possession of the residuary legatee for life; and that the remedy of the legatee in remainder, was to be asserted by action against her representative. An administration *de bonis non* was then resorted to, in the hope that the defendant might be unable to prove a technical administration, which woutd exclude the technical title of the present administrator. There is no affidavit of merits. There is no pretext of merits set out in the record. Having defeated one title, another rises up, as it were out of the ruins of the first. If we defeat this other, what security have we that a third claimant will not present himself in the person of a creditor? and a fourth in the person of a particular legatee? *Interest reipublicæ ut sit finis litium.* Let this false clamor cease. Give us the costs of the defence we have already made. If any other

should feel disposed to renew the contest, we shall then be the better prepared to meet him.

By the Court—

APPEAL DISMISSED.

JOHN WELLS, WILLIAM MILLER, AND LEVIN P. CLARKE, *vs.* JAMES BISCOE, CLAIMANT OF PROPERTY ATTACHED AS OF SAMUEL B. HICKOX.—*December* 1845.

A non-resident had goods in the State, which he assigned, *bona fide*, in payment of a precedent debt, to a resident; and the warehouseman, with whom the goods were deposited, accepted the order of the assignor to deliver them to the assignee. A few days after this, they were attached, as the property of the *non-resident* assignor. The assignee appeared in the cause and claimed them; HELD, it was not necessary that the assignment should have been recorded, under the act of 1834, chap. 79, sec. 3, to perfect the transfer.

APPEAL from *Baltimore* county court.

On the 11th October 1841, the appellants sued out an attachment against the goods of *S. B. Hickox*, which was laid upon a lot of pig iron, valued at $540, and for which, *Ellicott & Brothers*, gave a receipt to the sheriff, as left by him on storage with them.

At the return of the writ, *James B. Biscoe* appeared, and claimed the iron as his own property; interposed such claim against the condemnation thereof, and ruled the plaintiffs to reply to his claim.

At a subsequent term, the plaintiff moved the county court to enter a judgment of condemnation, as for want of a plea to the attachment, which that court refused; and then the plaintiffs replied, that the iron was not the property of the claimant; on which issue was joined.

The case was then submitted on the following statement:—

It is admitted, in this case, that the iron in controversy was the property of *Samuel B. Hickox*, the defendant in the original suit, and was placed by him on storage with *Messrs.*

Ellicott, in whose hand the attachment was laid. That on the 7th October 1841, before the issuing of this attachment, *Hickox* assigned the said iron to *Biscoe*, the claimant *bona fide*, in payment of his note for $300, at sixty days, dated the 8th August 1840, then due, and held by *Biscoe*; that he gave the order on the *Messrs. Ellicott*, which is shewn in evidence, (marked A,) and that they accepted the said order some eight or ten days before the issuing of the attachment, and afterwards held the iron on account of *Biscoe*. That *Hickox* was, at the time of said transfer, and of the issuing of this attachment, a non-resident. That said order was not recorded, nor was any record made of said transfer, before the issuing of this attachment. It is admitted, that the debt upon which this attachment was issued, was due to the plaintiffs. If the court should be of opinion, that the above transfer is valid, the court to enter judgment for the claimant, otherwise for the plaintiffs.

Exhibit A. "*Baltimore*, October 7, 1841. *Messrs. Ellicott & Brothers*, gentlemen, please to deliver to *Mr. James Biscoe*, the high pig metal in your store, or any part thereof, that he may call for, and I will pay freight and charges, and oblige yours, &c., *Samuel B. Hickox*.—26½ tons."

Endorsed.—"Received to be recorded, the 17th day of December 1841, at two o'clock, P. M.; same day recorded in liber TK, No. 64, folio 320, one of the records of *Baltimore* county, and examined per *Thomas Kell*, clerk."

The county court was of opinion, that the assignment mentioned and referred to in the aforegoing statement of facts, is a valid and *bona fide* assignment; and that the goods and chattels, so as aforesaid attached, as of the goods and chattels of the said *Samuel B. Hickox*, are not the goods and chattels of the said *Samuel B. Hickox*, as the said *James Biscoe*, claiming as aforesaid, hath, by his claim and plea aforesaid alleged. Judgment for the claimant, from which the plaintiffs appealed to this court.

The cause was argued before Dorsey, Chambers, Magruder, and Martin, J.

By DULANY for the appellant :—

Who relied upon the third section of the act of eighteen hundred and thirty-four, section seventy-nine, which declared, that where any attachment shall be laid upon the chattels, &c., of a non-resident defendant, no transfer assignment of such chattels, &c., shall have any effect against such attachment, unless the same shall have been recorded in the office of the clerk of the county in which such attachment shall have issued, before the time of such issuing. This attachment cannot be defeated without giving effect to the unrecorded assignment, which the court will not do.

By DAVID STEWART for the appellee :—

The iron was passed in payment of a previous claim. It was a payment. The *Ellicotts* were mere custodiaries. The order transferred the possession, and was accepted. It was not an assignment of the title; it was symbolical delivery, perfected by acceptance, equivalent to actual delivery. 24 *Pick.*, 42. 1 *Tuunt.*, 459. 14 *East.*, 308. 5 *John. R.*, 335.

The construction of the act contended for, would prevent sales of merchandize, where the vendor was a non-resident. It was never intended to apply to such transactions, nor to assignments consummated by delivery. It was not intended by the act to do more than require recording, where the right of the assignee rested in action, as distinguished from possession, either in himself or his agent.

BY THE COURT— JUDGMENT AFFIRMED.

GEORGE FITZHUGH AND OTHERS, *vs.* W. MCPHERSON, A. D. B. N. OF LEWIS NETH.—*December* 1845.

In 1791, *G* conveyed an estate to *W*, in trust, and by way of mortgage, to secure *D* a sum of, &c., then due and owing from *G* to *D*. After this, *W* conveyed the same estate to the three children of *G*, who, in 1805, conveyed it to *R*, *executrix of D*, to secure the original debt, and a further sum, with interest. These debts were assigned by *R* to *B*, in 1806, and by him to *N*, in 1812. In 1822, *G*, and two of his children, executed a bond to

N, for the sum of, &c. the mortgage debt. This sum was composed of the two principal debts, with interest added from their dates, after allowing various credits for interest, to the time of the assignment to *B*, in 1806, and then with interest on the aggregate as principal, allowing intermediate credits less than the interest, to the date of the second assignment to *N*, in 1812; at which time, the interest was again added to the principal, and interest upon that aggregate to 1822, when the bond to *N*, was given for the whole sum. The bill charged a concurrence of the three children of *G*, in the bond of 1812, and as to the one who did not sign it, there was a decree, *pro confesso*. HELD: that as in 1806, interest had accrued on the mortgage debt, there was no objection to converting it into principal at the time of the assigment to *B*; and as interest had accrued to him, there was no objection in converting it, also, into principal, at the time of the assignment to *N*, and that, therefore, the bond taken in 1822, was not usurious, and was evidence of the debt due under the mortgage, which would not be reduced by excluding the interest, or the interest added to the principal.

Where interest has once accrued, it becomes a debt, and there is no longer any objection to an agreement *inter partes*, that it shall be considered principal, and carry interest.

Defensive averments in an answer, not responsive to a bill, unsupported by proof, are disregarded at the hearing.

Upon a decree *pro confesso*, it is an established principle, that the allegations of the bill are to be received as true, as to those parties against whom the decree passed.

Where a bill charged, that a complainant was entitled to the mortgage debt, with interest thereon, this averment authorises the recovery of the debt, with either simple or compound interest, as appears to be just upon all the circumstances of the case.

APPEAL from the Court of Chancery.

This cause was before this court at June term 1837, and is reported in 9 *G. & J.*, 51.

The statement of the appellee's counsel, (*T. S. Alexander, Esq.*,) is adopted by the reporter, as fully stating the condition of the cause.

On the 10th October 1791, *George Fitzhugh, the elder*, conveyed unto *Walter Dulany*, certain real and personal estates, in trust, and by way of mortgage, amongst other things, to secure to *Daniel Dulany* the sum of £230, then due and owing from *Fitzhugh* to *Daniel Dulany*.

Some time after, *Walter Dulany* conveyed the above trust estates to *Mary Fitzhugh*, *George Fitzhugh, Jr.*, and *Daniel D. Fitzhugh*, children of the above named *George*, who, on the 27th April 1805, conveyed the same property to one *Re-*

becca Dulany, and the above named *Walter Dulany*, in trust, or by way of mortgage, amongst other things, to secure unto the said *Rebecca*, as executrix of the before named *Daniel Dulany*, then deceased, the payment of the aforesaid sum of £230, and the further sum of £400, with interest, which was admitted to be then due from the grantors to the said *Rebecca*.

The original of the latter conveyance was filed in the cause, with endorsements thereon:—

First. Of an assignment by *Rebecca Dulany*, of all her interest therein to *Thomas Buchanan*, dated 11th December 1806; and

Secondly. An assignment by *Thomas Buchanan*, of all his interest therein to *Lewis Neth*, which is dated 2nd March 1812.

On the 22nd April 1822, a settlement was made between *Lewis Neth*, and *George*, *Daniel*, and *Mary Fitzhugh*, of the balance due on the foregoing security; and the same being adjusted at the sum of $5915, the said *George Fitzhugh*, *Daniel D. Fitzhugh*, and *Mary Fitzhugh*, executed their joint and several bond to the said *Lewis Neth*, to secure the payment of the said balance, with interest from the date of the settlement.

On the 26th January 1825, *George Fitzhugh*, *Daniel D. Fitzhugh*, and *Mary Fitzhugh*, executed and delivered to *Lewis Neth*, another instrument of writing, wherein it is stated, that "on the 27th day of April 1805, a deed of mortgage was executed by *Mary Fitzhugh*, *George Fitzhugh*, and *Daniel D. Fitzhugh*, to *Rebecca Dulany*, and *Walter Dulany*, among other things, to secure the payment of the debt, before mentioned, to *Rebecca Dulany*, and that the same mortgage and debt was afterwards assigned by the attorney of *Rebecca Dulany*, to *Thomas Buchanan and wife*, and by the said *Buchanan* to *Lewis Neth*. And that the mortgagors had lately had a settlement of the said debt, and ascertained the balance due thereon to the said *Neth*, as assignee, and for said balance, being $5915, did, on the 22nd April 1822, execute their bond to said *Neth*. It is therefore acknowledged, that the money due on said bond, is the sum now due on account of the debt first mentioned, and that the mortgaged premises are now answerable for the same."

Lewis Neth, afterwards, died intestate, leaving *Lewis Neth, Jr.*, his only son and heir at law, who also became his administrator; and on his death, administration *de bonis non*, on the estate of his father, was granted to *Samuel Maynard*.

On the 6th April 1833, *Samuel Maynard*, as *administrator de bonis non* of *Lewis Neth*, the father, filed his bill in the Court of chancery against *George Fitzhugh, Mary Fitzhugh*, and *Daniel D. Fitzhugh*, and the *President and Directors of the Bank of Maryland*, for a foreclosure and sale of the mortgaged premises. The bill first sets out the mortgage from *George Fitzhugh, the elder*, (whom it supposes is dead,) to *Walter Dulany;* the conveyance from *Walter Dulany* to *Mary Fitzhugh, George Fitzhugh, Jr.*, and *Daniel D. Fitzhugh;* and the mortgage from those last mentioned grantees, to *Walter Dulany* and *Rebecca Dulany*.

It next charges, that the debts secured by said mortgages, have become satisfied, and the trusts thereby created, have been fulfilled; saving only, and excepting in so far as the same relates to the sums of £230, and £400, with interest, which were due to the said *Rebecca Dulany;* and charges the assignment of the same debts, as before stated, to *Lewis Neth;* the settlement between the assignee and the last named mortgagors; and the execution by them of the bond and the agreement, before mentioned. It charges further, that a subsequent mortgage of the same premises, has been made to the *President and Directors of the Bank of Maryland*, by some or all of the other defendants; and they are, therefore, made defendants to the bill.

On the 10th September 1833, *Daniel D. Fitzhugh* filed his answer, and thereby admits the execution of the mortgages of 1791, and 1805. He denies, that the debts secured by the same mortgages, have been paid, and the trusts thereby created, fulfilled: and, on the contrary, avers, that the debt in the first mortgage, stated as being due to *Upton Scott*, is still due, with interest thereon, from some time in the year 1809; and that the debt secured by the second mortgage, to be paid to *Mary Fitzhugh*, is still due and unpaid, with a large amount of interests. He admits the assignment of the claims of *Rebecca Dulany* to

Lewis Neth, as before stated; but insists, that the interest on the debt of £400, has been paid up to the 31st March 1810. He admits, that in the year 1822, he, with *Mary Fitzhugh*, and *George Fitzhugh, the elder*, who is charged to be yet alive, came to a settlement with *Lewis Neth*, and gave their bond to him for $5915, they then supposing that to be the amount due; but the defendant since believes there was a considerable mistake made in the calculation, and that upon an examination into the matter, it will be found that a much less sum was due. He admits the execution of the agreement, which he avers, was signed by *George Fitzhugh, the elder*, and not by *George Fitzhugh, Jr.*

30th December 1833, the complainant filed his amended bill, making *George Fitzhugh, the elder*, and *Walter*, and *Rebecca Dulany*, parties defendant. The bill stated, that the two last named defendants, in their lifetime, resided out of the State of *Maryland*, and it was not known whether they were alive or dead; and if dead, who were their representatives; and an order of publication was passed against them.

20th February 1834, the *President and Directors of the Bank of Maryland* filed their answer; in which they alleged, that the defendant, *Daniel D. Fitzhugh*, has mortgaged his interest in the premises to them, and aver their ignorance of all other matters alleged in the bill, and leave the complainant to his proof, &c.

1st April 1834, the bill was taken, *pro confesso*, as against the defendants, *George Fitzhugh* and *Mary Fitzhugh;* and an interlocutory decree, under the act of 1820, was passed against *George Fitzhugh, the elder*.

A general replication was entered to the answers, and a commission in chief, and a commission *ex parte*, were then issued, and the complainant proved :—

Exhibit A. Marked, also, LG, No. 4; being the deed from *George Fitzhugh* to *Walter Dulany*.

Exhibit B. Marked, also, LG, No. 3; being the deed from *Mary Fitzhugh, George Fitzhugh, Jr.*, and *Daniel D. Fitzhugh*, to *Rebecca* and *Walter Dulany*, with the assignment thereon, as before stated.

Exhibit C. The bond from *Mary Fitzhugh* and others, to *Lewis Neth*.

Exhibit D. The agreement between the same parties.

19th October 1834, the bill was taken, *pro confesso*, against *Walter* and *Rebecca Dulany*.

12th November 1835, the cause was referred to the auditor, with directions to state an account of the balance due the complainant, subject to all exceptions.

The defendants offered proof before the auditor, of two payments made to *Thomas Buchanan*, on the 24th September 1807, and 23d April 1808; and also, that the bond and agreement were executed by *George Fitzhugh, the elder*, and not by *George Fitzhugh, Jr.*

14th December 1835, the auditor reported, that in accordance with instructions of the solicitor for the defendants, he had stated the claim of the complainant in four different aspects, as exhibited in his accounts, Nos. 1, 2, 3, 4; that he had stated the same claim according to the instructions of the complainant, in account No. 5; and that he had also stated an account No. 6, showing the amount due to the complainant, according to the view of the case taken by the auditor.

He further reports, that in an account, No. 6, the auditor has rejected the payments made to *Thomas Buchanan*, (as proved before the auditor,) because the said payments profess to be made on account of a mortgage from *George Fitzhugh* to *Mrs. Dulany*, and which had been assigned to said *Buchanan;* and not on account of the mortgage, in the proceedings mentioned, which is from *George Fitzhugh* and others, to *Rebecca Dulany* and *Walter Dulany*, assigned to *Thomas Buchanan*. Although there is much to lead to the conclusion, that these mortgages are one and the same, yet when it is considered, that this evidence is merely proof of the handwriting, and is offered at this late date in order to correct, as is alleged, an error, committed more than twelve years ago, in a settlement which has been solemly sanctioned by two deeds of the parties, and by their frequent payments of interest on the balance due by them, as ascertained at that settlement, it appears insufficient to prove such error.

In this account, No. 6, the auditor has rejected the bond and deed of the parties, wherein even a larger amount than the aggregate of the principal and interest of the mortgage debt, due at the execution of said bond and deed, seem to have been united, and the whole attempted to be secured as a principal sum by the original mortgage. This attempt to secure by the original mortgage, more than the principal therein mentioned, with legal interest thereon, the auditor submits, is contrary to the terms of the said mortgage, and illegal; and the complainant is entitled to claim, as a lien on this estate, only the principal mentioned in the mortgage, with the interest thereon; and the rights of the complainant under the bond, it is also submitted, are not impaired by this opinion.

In account No. 1, the defendants are charged with the principal debts secured by the mortgages of 1791, and 1805, and with simple interest thereon; and are credited with the payments to *Thomas Buchanan*, in 1807 and 1808, as proved before the auditor. The balance due by this account, is $3080.69.

In account No. 2, the defendants are charged with the principal debts, as before stated, and with simple interest thereon, from dates in the year 1807, which are arbitrarily assumed. The balance due by this account, is $1893.29.

In account No. 3, the defendants are charged with the principal debts, as before stated, and with simple interest thereon, to 22nd April 1822: credits are given for the payments made to *Mr. Buchanan*. The balance is then converted into principal, and interest charged thereon to the present time. The balance due by this acount, is $5218.54.

In account No. 4, the defendants are charged with interest, from arbitrary dates in 1807, to a day in 1823. The payments to *Thomas Buchanan*, are credited; the balance is then converted into principal, and the account continued down; the balance due is thus made to be $1864.36.

In account No. 5, the defendants are charged with the amount of their bond given to *Lewis Neth*, on the 22nd April 1822, and with interest thereon in the usual manner. The balance due by this account, is $8162.22.

Account No. 6, differs from account No 1, in this particular alone, that it excludes the credits for payments to *Mr. Buchanan*. The balance made due by this account, is $3402.46.

In all the accounts, the defendants are credited with certain payments on the bond, which are admitted to have been made by *George Fitzhugh, Jr.*, subsequent, of course, to the year 1822.

7th January 1836, the complainant excepted to the auditor's report, and his accounts, Nos. 1, 2, 3, 4 and 6.

1. Because said accounts, Nos. 1, 2, 3 and 4, in so far as they differ from his account, No. 5, are not supported by any proof whatever; and on the contrary, are directly opposed by the evidence in the cause. The said statements assume arbitrary periods for the commencement of the account; and the proof being, that a settlement was had on the 22nd April 1822, and a balance was then struck, and acknowledged to be due by the parties, under their seals;—*first*, by their bond, dated 22nd April 1822;—*secondly*, by their agreement or admission, under seal, dated 26th January 1825.

2. Because the auditor, in his account No. 6, has entirely disregarded the aforesaid settlement and admissions, under seal, and by his report has charged the parties with an attempt to secure, by said instruments, a greater sum than is really due, and has declared such attempt to be illegal. Whereas, there is no evidence, whatever, in the cause, tending in any manner to draw into question, the fairness and lawfulness of the aforesaid settlement; and in opposition to the aforesaid views of the auditor, this exceptant insists :—1st. That the aforesaid settlements being wholly unimpeached, furnish conclusive evidence of the extent of this exceptant's claim, as stated in account No. 5. 2nd. That the decree, *pro confesso*, against *Geoge Fitzhugh, Jr.*, and *Mary Fitzhugh, estop* the said parties from denying the correctness of the settlements aforesaid; and no evidence, whatever, has been furnished by *Daniel D. Fitzhugh*, in support of his averment, that more was allowed to be due by said settlement, than in fact was due.

3. That the fact, that the principal debts, with simple interest thereon, from the dates mentioned in the mortgage, to the

day of the settlement, (22nd April 1822,) do not equal the sum which is admitted to be due by the aforesaid bond and agreement, is by no means conclusive to shew, that the party has attempted to secure to himself, the payment of a larger sum than is legally secured by the deed of mortgage. It was perfectly competent for the parties at any intermediate time or times, to add the interest to the principal, and to allow interest on the compounded sum. And it will be evident, by calculation, that in fact the interest was compounded at the date of the assignment, by *Mrs. Dulany* to *Mr. Buchanan*, (11th December 1806,) and again, at the date of the assignment by *Mr. Buchanan* to *Mr. Neth*, (2d March 1812.)

From the report of the case in 9 *G. & J.*, 51, it appears that the appellants insisted, there was no evidence of the authority of *William Cooke*, as attorney for *Rebecca Dulany*, to assign her claims to *Thomas Buchanan*. But assuming the existence of such authority, it is conceded by their succeeding points, that the appellee was to be treated as assignee of the two debts, of £230 and £400; and it is then attempted to be shewn, that the interest of *George Fitzhugh, the elder*, in the premises decreed to be sold, never was charged or chargeable with the debt of £400; that the bond and agreement to compound the interest, and make it a charge upon the whole property, could only bind the parties thereto, and could not bind others, whose debts are secured by the same mortgage, or a subsequent mortagee.

The court decided, that there was sufficient evidence of the legal assignment of *Rebecca Dulany's* claims, to the person under whom the appellee derived his title; and that by force of the bond and agreement, stated, the interest of *George Fitzhugh, the elder*, in the premises decreed to be sold, was well charged with the payment of both debts, and the arrear of the interest thereon. But because of various defects in the proceedings, the court waived the consideration of the question, how far the agreement to compound interest on those debts could bind others than the parties thereto, and remanded the cause to the Court of chancery, "for the purpose of amending the pleadings, making *Upton Scott*, if living, or if dead, his

legal representative or representatives, a party or parties defendant; and that such further testimony be taken therein, and other proceedings had under the Chancellor's direction, as shall be necessary for determining the cause upon its merits."

Pending the appeal, *George Fitzhugh, the elder*, died. The appellee likewise died, and thereupon, administration *de bonis non*, on the estate of *Lewis Neth*, was granted unto *William S. McPherson*, who,

On the 12th March 1839, the complainant filed his amended and supplemental bill of complaint, and of revivor, against *George Fitzhugh, Jr.*, *Mary Fitzhugh*, *Daniel D. Fitzhugh*, the *Bank of Maryland*, *Thomas G. Waters*, and *Walter* and *Rebecca Dulany*. As new matter, it is charged, that the descendable interest of *George Fitzhugh, the elder*, in the premises aforesaid, had vested in the defendants, *George Fitzhugh, Jr.*, *Mary* and *Daniel D. Fitzhugh*, his only children and heirs at law; and it is insisted, that his interest in the premises, thus descended, is bound by the mortgage made by the younger *George*, *Mary* and *Daniel*, as effectually as if the same had vested in or descended to them, prior to said conveyance.

That the bond and agreement, aforesaid, were executed by *George, the elder*, and therefore, that his interest in said premises, descended as aforesaid, is bound by his execution of said instruments. And that said instruments were executed with the knowledge and consent of *George, the younger*, and with the intent to charge his interests in the premises aforesaid, as well as the interests of the other parties therein, with the payment of principal and interest of the aforesaid claims, as compounded as aforesaid; and amongst other proofs of this fact, it is charged, that the payments made on said bond, were all made by the said *George, junior*, with the intent and design of having the same applied to the payment of interest, on the said consolidated debt.

That *Upton Scott* departed this life upwards of twenty years ago.

That the claim of the *Bank* of *Maryland*, before stated, "has been entirely satisfied, and that in truth there is no other charge against said premises, remaining unsatisfied."

Daniel D. Fitzhugh, in his answer states, that the settlement made on the 22d April 1822, of which the bond, exhibit C, was the result, was made by and between *George Fitzhugh, the elder*, and *Lewis Neth, the younger*, the son and agent of the complainant's intestate. That the respondent says he believes, the defendants, *Mary* and *George, the younger*, had no knowledge of the details of the settlement, nor of its correctness or propriety. That the respondent did, at the time, object to signing said bond, but was finally induced to do so at the earnest request and solicitation of his father, who represented that the mortgage would otherwise be immediately foreclosed, and the estate probably sacrificed. That the said bond, was in fact, executed by *George, the elder*, and not by *George*, the son. That some time before the execution of said bond, at the request of his father, (who had then reached an advanced age,) this defendant assumed the control and management of the farm, and that every payment thereafter made to the said *Lewis Neth*, was in fact, made by the respondent from the proceeds of the farm, and that no payment was ever made by *George, the younger*, except as agent of respondent. That before the execution of said bond, he never did agree with said *Neth* to compound the interest on said mortgage debt, and he has no knowledge whether the sum mentioned in said bond, was made and arrived at by compounding the interest on the said mortgage debt, or how otherwise, the said sum was arrived at. He utterly denies that he ever did agree with the said *Neth* to compound interest on the said debt, unless such agreement be contained in said bond or in the instrument of writing marked D, and avers his belief, that the sum in said bond mentioned, could not be made by compounding interest on said mortgage debt, from the date of the assignment thereof to said *Neth*, up to the date of the execution of said bond. He further states, that whilst the said mortgage debt was held by *Thomas Buchanan*, the annual interest thereon claimed was $107.79, or thereabouts, and that said interest was fully paid to said *Buchanan*, up to the 31st March 1810. That the agreement, exhibit D, was executed by him at the request and solicitation of his father, in like manner as

exhibit C had been previously executed, and without any examination by him into the correctness of the debt, therein said to be due, and that said exhibit was executed by *George, the elder*, and not by *George*, the son; and he concludes by averring, that the said exhibits were made and delivered for the purpose of securing the payment of money upon a usurious and unlawful contract, whereby there was assured to said *Neth*, for the forbearance of said money, above the rate of $6, for the forbearance of $100 a year.

Mary Fitzhugh, by her answer, admits the execution of the deeds, marked A & B. She admits, also, that she has understood from her father, that the *said debts*, *in said deed* mentioned as due to the said *Rebecca Dulany*, were assigned to *Thomas Buchanan*, and that the *same debts* were afterwards by him assigned to said *Neth;* but she has no knowledge of said assignments, nor whether the said mortgage deeds, or either of them, were assigned to said *Buchanan* or *Neth*. That she is informed, and believes, considerable sums were at different times paid by her said father, and *Daniel D. Fitzhugh*, on account of said *debts*, but the amount of said payments she does not certainly know. She admits, that on or about 22nd April 1822, a settlement was made by and between her said father and *Lewis Neth, the younger*, in which she took no part, and of the details of which, she had no knowledge; but after said settlement, she was called upon by her father to execute, and together with her father, and *Daniel*, her brother, did execute the bond, exhibit C, and that afterwards, at the request of her father, she did, together with him and *Daniel*, execute the instrument of writing, exhibit D. That she has no knowledge, how the sum of money mentioned in the exhibits C & D, were made, or arrived at, but expressly avers, that she was not asked, and never did agree, to compound the interest on said mortgage debt, unless the mere execution of the exhibits C & D, under the circumstances above mentioned, amount to such agreement. She avers her belief, that the sum in those exhibits mentioned, could not have been made or arrived at, by compounding the interest in said mortgage debt; and further insists, that those exhibits

were executed and delivered at the request of said *Neth*, and by his procurement, for the purpose of securing the payment of money in a usurious and unlawful contract, &c.

This bill was taken *pro confesso*, as against *George Fitzhugh, Jr.*, and it will appear, that the family of *Worthingtons*, the children of a deceased daughter of *George Fitzhugh, the elder*, and who as such, were heirs at law, have virtually disclaimed. An amended bill was filed, for the purpose of making them parties, which they answered, and sufficient evidence to change them, will be found in the agreement, and the testimony. As against them, therefore, and *George Fitzhugh, Jr.*, the case, it is presumed, is clearly made out.

There was a decree, *pro confesso*, against the *Dulany's*.

In relation to the claim of *Upton Scott*, the answer of *Thomas G. Waters*, as *administrator de bonis non* of *Upton Scott*, disclaiming all interest in the writ.

The amended bill charges, that *Scott*, in his lifetime, assigned the claim to *Henry Maynadier*, in trust, to apply the same, when secured, to the use and benefit of *Margaret Maynadier*, and delivered said assignment, endorsed on the claim itself, unto the said *Margaret*, who kept the same, until her intermarriage with the defendant, *Daniel D. Fitzhugh*, upon which event it came into his possession. And that the rents and profits of the trust estate received by the said *Daniel*, have been more than sufficient to satisfy the claim.

The answer of *Maynadier*, is a virtual disclaimer of all interest in the writ. And as against *Daniel D. Fitzhugh*, and *Margaret*, his wife, the bill was taken *pro confesso*.

Upon the death of *Daniel D. Fitzhugh*, a bill of revivor was filed against his children's administrator. In this bill it is charged, that the said *Margaret* died in the lifetime of her said husband, and that no administration has been taken out in her estate, the said claim having been satisfied to her said husband in his lifetime.

The answers of those children, and administrator, do not vary the state of the case.

There is a release from the *Bank of Maryland*, to *Daniel D. Fitzhugh*, which entirely destroys its interest in the suit.

The following agreement signed by counsel, for all the parties, was filed in the cause:—

It is agreed and admitted, that the paper filed with the original bill, on April 6th, 1833, marked exhibit A, and also LG, No. 4, is a correct copy of the mortgage given by *George Fitzhugh, Sr.* to *Walter Dulany*, as stated in said bill; that the paper filed as above, marked exhibit B, and also LG, No. 3, is a correct copy of the mortgage from *Mary Fitzhugh, George Fitzhugh, Jr.*, and *Daniel D. Fitzhugh*, given as stated in the proceedings.

That the paper marked LN, and purporting to be a bond from *George, Mary*, and *Daniel D. Fitzhugh*, to *Lewis Neth*, and the other paper, marked D, and also LG, No. 2, and purporting to be an agreement between the same parties, were signed, sealed and delivered by the defendant, *Mary Fitzhugh*, and by *George Fitzhugh, Sr.*, and *Daniel D. Fitzhugh*, both of whom are since deceased, as stated in the proceedings. That the endorsements of credits on the said bond LN, are correct as to the facts stated therein, but that the said payments and deposits by them referred to, and acknowledged as made by *George Fitzhugh, Jr.*, were made by him in the bank referred to, as agent of *Daniel D. Fitzhugh*, and not on his own account; said *Neth* being aware of their being so made, and of said agency also. That the assignments endorsed on said paper LG, No. 1, purporting to be a copy of the mortgage from the said *Mary Fitzhugh, George Fitzhugh, Jr.*, and *Daniel D. Fitzhugh*, to *Rebecca Dulany*, and *Walter Dulany*, were made in manner and form as they appear, and the proofs already in the cause relating to said assignments, are likewise admitted.

It is further admitted, that the debt formerly due to the *President and Directors of the Bank of Maryland*, has been satisfied. That after the death of *Lewis Neth*, aforesaid, administration on his estate was duly granted unto *Lewis Neth, Jr.*, deceased, and upon his death, administration *de bonis non* was duly granted on said estate to the original complainant, *Samuel Maynard*, and upon his death, administration *de bonis non* was duly granted unto the present complainant.

That the papers endorsed, TB, No. 1, TB, No. 2, purporting to have been signed by *Thomas Buchanan*, under whose assignment complainant now claims, were in fact signed by said *Buchanan*, and are to be taken as evidence of payments to the amounts therein specified and acknowledged, made on account of the aforesaid mortgage debt as specified in said papers; this admission however, being confined to the facts, all legal questions and inferences arising being expressly reserved.

That the paper marked exhibit US, is the original bond from *George Fitzhugh, Sr.*, to *Upton Scott*, mentioned in and secured by the mortgage from *George Fitzhugh, Sr.*, to *Walter Dulany*, already hereinbefore mentioned, and the due execution of the assignment thereon is likewise admitted. That the defendant, *George Fitzhugh, Sr.*, deceased, occupied the premises, mortgaged as aforesaid, until 1821, in virtue of his legal title thereunto; at which said time, *Daniel D. Fitzhugh* became the purchaser of his said father's interest, and retained the possession thereof until 1836, when his said father died, since which time the said *Mary* and *Daniel*, and after his decease, the heirs of the latter, have enjoyed their respective rights in and to said premises, no legal impediment having at any time existed to exclude said *Mary* from the exercise of any legal or equitable rights, which she may have had.

It is further agreed, that the complainant shall be entitled to the benefit of his several decrees, *pro confesso*, against defendants hereto, and that as to the defendants who have answered, this statement of facts is to be treated as in aid of proofs after a general replication. And nothing in this agreement shall be construed to admit the plaintiff's right to a decree against any property of *George Fitzhugh Jr.*, which he shall not, by the pleadings, proofs, and facts agreed to, show to be embraced within his lien.

The auditor reported sundry accounts, Nos. 7, 8, 9 and 10, in conformity with the instructions of defendants. In all those accounts he charged the defendants with the principal debts of £230, and £400, and with interest thereon on various principles.

To all those accounts the complainant excepted, and insisted, that the account No.5, formerly reported, truly stated the balance due on his claim.

The defendants, *Mary Fitzhugh*, and the children of *Daniel D. Fitzhugh*, excepted to the auditor's report of 1835, and all the accounts filed therewith, except No. 1.

They excepted to the bond of 1822, and agreement of 1825, as usurious and void, because they were given to secure a greater amount than was due for principal and interest at the times of their execution.

And now insist, that they are liable only for the debt of £400, with interest from 4th November, 1793.

The Chancellor, (BLAND,) by his decree, dated 8th March 1843, again ratified account No. 5, and directed a sale of the mortgaged premises.

From this decree the *Fitzhughs* appealed.

The following is a copy of the statement submitted on the former hearing, to confirm the position then taken, that the amount due was adjusted by compounding the principal and interest, due at the time of the respective assignments, and again at the time of settlement.

The principal debts amount to, - - -	$1680 00
Interest on $613.33, from 10th October, 1791, to 11th December 1806, date of the first assignment—15y. 2m. 1d. - - - - -	558 23
Interest on $1066.67, from 4th November, 1793, to ditto—13y. 1m. 7d. - - - - -	838 58
	$3076 81
Interest on the whole to 24th September, 1807—9m. 13d. - - - - - - - -	145 12
	$3221 93
Payment, - - - - -	215 62
	$3006 31
Interest on balance to 23d April, 1808—6m.29d.	104 72
Carried forward, - -	$3111 03

Brought forward, - -	$3111 03
Payment, - - - - -	107 79
	$3003 24
Interest on balance to 2d March, 1812, date of second assignment—2y. 10m. 9d. - -	695 25
	$3698 49
Interest on the whole to 22d April, 1822, the date of settlement—10y. 1m. 20d. - - -	2249 91
	$5948 40

The bond is given for $5915.

The cause was argued before DORSEY, SPENCE and MARTIN, J.

By WALLIS, DULANY, and MCMAHON, for the appellants, who contended:—

The decree in this case, was rendered for the amount of the mortgage debt, as ascertained by the auditor's statement No. 5, which was adopted and ratified. This statement assumes, that *Neth* was the assignee of both of the debts of *George Fitzhugh* to *Rebecca Dulany*, as described in the mortgage deed of 27th April 1805, and that the amount of those was conclusively ascertained by the bond executed on the 22nd April 1822.

And the appellants, in opposition to this decree, and contending for its reversal, will insist:

1st. That the evidence does not establish, that *Neth* was assignee of more than the £400 debt mentioned in said mortgage.

2nd. That even if *Neth* is admitted to have been assignee of both debts, could not by any computation of them, with simple interest, up to the date of said bond of 22nd April 1822, have amounted to the sum mentioned in said bond; and that the said sum could only have been made out as the amount of the debts then due, by charging illegal and usurious interest.

3rd. That the said calculation in 1822, of the amount due, could not be sustained even by compounding, at the periods of the assignment to *Buchanan* and *Neth*, as also at the date of said bond, (April, 1822;) and that, even if it could, there is no evidence of any agreement on the part of the appellees, or any of them, to compound at the period of the assignment by *Mrs. Dulany* to *Buchanan*, or of the assignment by *Buchanan* to *Neth*, nor any right in said assignees respectively, to have the debt compounded at the period of said assignments, or of either of them.

4th. That there was no agreement to compound, at the period when the said bond of 22nd April 1822, was executed on the part of the appellees, or any of them, and if there were, it could only be binding as an agreement to convert the interest into principal, at that date, so as to make the compounding operate prospectively; and that any agreement at that period to compound retrospectively, as between the mortgagor and mortgagees, is illegal and usurious, and so oppressive to the mortgagees, that equity will relieve them from it.

5th. That the amount of the debt, as ascertained by said bond of April 1822, could only have been made out by the exaction of illegal and usurious interest, or by such compounding of the debt as the law regards as oppressive, as between mortgagor and mortgagee, and the appellees are entitled to be relieved against it, at least to the full extent of the usury or exaction, and to have the mortgage debt ascertained, either by computing them with simple interest down to the present period, or if there be proof of any agreement, then by computing them with simple interest down to the period of such agreement, if any, and with simple interest from that period forward on the compounded sum.

6th. That as to the appellee, *George Fitzhugh, Jr.*, the evidence shows, that there never was any agreement on his part to compound, nor any pretence of right to compound; and that, notwithstanding the order for decree, *pro confesso*, against him, the decree, as to him at least, was erroneous and must therefore be reversed, either generally, or as to him.

7th. That as to said appellee, *George Fitzhugh, Jr.*, the said decree if erroneous and reversed as to the other defendants, must also be reversed as to him.

By T. S. Alexander and R. Johnson for the appellee, who insisted in support of the decree :—

1. That the title of his intestate, *Neth*, as assignee of the entire interest of *Rebecca Dulany*, under the deeds of 1791 and 1805, is established by the order of this court, passed on the former appeal, and independently of that order, is clearly made out by the pleadings and proofs in the cause.

2. That the validity of the settlement of 1822, of the bond of 1822, and agreement of 1825, are established by the aforesaid order of this court, as against the parties to those transactions, and those, who at the time, or afterwards, consented thereto. And such participation and consent is clearly made out by the pleadings and proofs against all the appellants.

3. That under all the circumstances, the claim of *Upton Scott* ought to be treated as satisfied.

Martin, J. delivered the opinion of this court.

This case comes before us on an appeal from the Chancery court, and presents for our consideration the correctness of the decree of the Chancellor, of the 8th March 1843, adopting and ratifying the auditor's statement, No. 5.

The amount reported to be due to the complainant, by the auditor in this account, was ascertained, by treating *Lewis Neth* as the assignee of both of the debts embraced by the mortgage, of the 27th April 1805; and by compounding the principal and interest due on those debts, at the period of the assignment, from *Rebecca Dulany* to *Judge Buchanan*, and, again, at the time of their assignment from *Buchanan* to *Neth*.

These being the principles by which the auditor was regulated in the adjustment of the account, two questions are presented for the consideration of this court.

First. Whether *Lewis Neth* is to be regarded as the assignee of both of the debts described in the mortgaged deed, already adverted to? and

Secondly. If the auditor was correct in compounding the principal and interest, at the periods of the assignment from *Mrs. Dulany* to *Mr. Buchanan*, and from *Buchanan* to *Neth*?

Although many propositions were discussed in the course of the argument, the accuracy of the auditor's report, and the correctness of the Chancellor's decree, turn on the questions, as above stated.

When this case was before the court, in 1837, 9 *G. & J.*, 56, the counsel for the appellants raised the following points, in reference to the assignment of these debts:

"That there was no evidence, that *William Cooke*, who signed the assignment to *Thomas Buchanan*, as the attorney for *Rebecca Dulany*, was the attorney of *Rebecca Dulany;*" and "that the decree is for the sale of all the lands mentioned in the proceedings, for the payment of the two debts, of £230, and £400, added together, and interest compounded thereon, when complainants, exhibits *A* and *B*, shew, that the life estate of *George Fitzhugh*, *Sen.*, in five hundred acres, and his fee-simple estate in one hundred and eighty-eight acres, never were charged or chargeable with the debt of £400." Upon this subject, the court declare:

"Such an objection, comes with an ill grace from the defendants, under the circumstances of this case. The assignment was made in 1806. It has been acquiesced in, and recognized by the appellants, from that time, until the filing of their notes in this court, a period of more than thirty years. They have for about twenty-five years, continued, from time to time, to pay to the said assignee, and those claiming under him, interest due on the *debts* assigned. *Daniel D. Fitzhugh*, one of the appellants, in his answer, in express terms, admits the assignment of the *debts* due to the said *Rebecca Dulany*, to *Thomas Buchanan;* and three, of the four appellants, by a bond and agreement, under their hands and seals, the first dated in 1822, the second in 1825, by necessary implication, and also in the said agreement, in express terms, admit the assignment and its validity, and in like manner make the same admission in 1835, in their instructions to the auditor to state the accounts."

It is seen, then, that the objection raised by the counsel for the appellants, on this question, presupposed, that *Neth* was the assignee of both the debts; and that such was the extent and character of the assignment, was held by the court as an unquestionable proposition. It is manifest, indeed, that *Rebecca Dulany* became, by force of the mortgage deed of the 27th April 1805, the holder of the two debts; and it is equally clear, we think, that the entire interest of *Mrs. Dulany*, passed to *Judge Buchanan*, by the assignment of the 11th December 1806; and that all the interest of *Buchanan*, was communicated to *Neth*, by the assignment of the 2nd March 1812.

The next question presented for our consideration, is that which respects the computation of interest, by converting it into principal, at the dates of the assignments, already referred to.

The right of the appellee's intestate to the interest, as compounded by the auditor, stands on the settlement of the 22nd April 1822, the bond of 1822, and the agreement of the 26th January 1825.

It is perfectly clear, as a legal proposition, that the holder of the mortgaged debt, was entitled to compound interest, on the principles adopted by the auditor, as against those parties who executed or assented to the papers, to which we have just adverted.

Coote, in his work on mortgages, 438, says:

"When interest has once accrued, it becomes a debt. There is no longer, therefore, any objection to an agreement *inter partes*, that it shall be considered principal, and, therefore, carry interest. Indeed, it would be injurious to the mortgagor to establish the contrary, as it would remove an inducement to the mortgagee's permitting his principal to remain, and, consequently, equity has recognised such agreements; but there must be no extortion on the part of the mortgagee, or, otherwise equity will interpose to the relief of the mortgagor." The same proposition is maintained in *Brown vs. Barkham*, 1 *P. W.*, 654. *Mowry vs. Bishop*, 5 *Paig.*, 98. 1 *Johns. Ch. Rep.*, 13. 3 *Ohio R.*, 17.

But, the doctrine announced by the Court of Appeals, on this question, renders the production of authorities unnecessary. They say:

"The 9th ground which is relied on by the appellants, for reversing the decree, is thus stated, because the mortgagors cannot, by any agreement, compound the interest on the principal debt, and render the whole a charge upon the lands, to the prejudice of those whose debts are secured by the same mortgage, and of the *Bank of Maryland*, a subsequent mortgagee. The first branch of this proposition has not been, and cannot be contended for; if by debts, secured by the same mortgage, is meant debts which are subsisting liens upon the mortgaged premises, and are obnoxious on the part of the plaintiff, if otherwise conflicting with his claim, to no other bar to their recovery, than that arising from the compounding of interest." And again they say:

"The point raised by the appellant's seventh ground, under the insufficient proofs in the cause, cannot be resisted. To bind the interest of *George Fitzhugh, Jr.*, in the mortgaged premises, for the interest compounded at the dates of the assignments of the mortgage debts to *Buchanan* and *Neth*, his concurrence in the making of such assignments, must be proved, or his subsequent ratification of, or assent to such compounding, must be shewn."

An examination of the record will show, that the defendants, *Mary* and *Daniel D. Fitzhugh*, admit by their answers, the execution of the instruments of 1822 and 1825, and as the defensive averments advanced by those defendants, for the purpose of extricating themselves from the operation of those papers, are not responsive to the bill, and are entirely unsupported by proof, they must be disregarded.

The position occupied by *George Fitzhugh, Jr.*, is different from that held by his co-defendants. The decree was taken against him *pro confesso*, and this being so, it is an established principle, that the allegations of the bill are to be received as true, so far as he is concerned. 10 *G. & J.*, 65. 1 *Hop. R.*, 476.

As the bill charges, that *Lewis Neth* was the assignee of both of the debts in controversy, and that the agreement and bond of 1822 and 1825, were executed with the knowledge and consent of *George Fitzhugh, Jr.*, those facts must be considered as proved against him.

A point was raised by the counsel for the appellants, preliminary in its character: "That there is no averment in either of the complainant's bills, of an agreement or agreements, to compound between the complainant, or those whom he represents, and the defendants, or those whom they represent, and that, therefore, all evidence tending to show a compounding in point of fact, was inadmissible; the want of the proper averment in the bill having been excepted to."

The bill charges, that the complainant's intestate was entitled to the mortgage debt, *with interest thereon;* and it was contended by the counsel for the appellants, that this averment did not authorise the introduction of the testimony, on which the appellee relies, as authorising his claim to compound interest.

To this proposition we cannot consent. Under the averment, to be found in the bill upon this subject, the complainant was entitled to recover his debt, either with simple or compound interest, as might appear to be lawful and just upon all the circumstances of the case.

It follows from the views thus expressed, that we concur in opinion with the Chancellor, and think that his decree must be affirmed.

DECREE AFFIRMED WITH COSTS.

F. DE LIZARDI ET AL., *vs.* JACOB J. COHEN, JR., ET AL.—*December* 1845.

C sued out an attachment against the goods of *J*, which was returned, attached as per schedule. At the return term, *L* appeared, claimed the goods, and pleaded, they were not the property of *J*, on which issue was joined. It was the only issue in the cause. At the trial, *L* offered *J*, who had previously been discharged under the bankrupt law of the *United States*, as a witness, to disprove the property in himself. HELD, that he was competent.

The witness was not responsible for the costs of the suit; and, in upholding the title of the claimants, was testifying against his own interest.

A defendant, in an attachment cause, returned *non est*, being called by a claimant, as a witness, to prove that the property attached did not belong

to the witness, who made no objection to being sworn, not liable for costs, nor interested in the event of the suit, even if he was to be regarded as a party to the record, that fact would not disqualify him as a witness.

The general rule is, that a party to the record, is not a competent witness, for he is generally, either interested in the object of the suit, or responsible for costs.

The form in which this rule of exclusion has been stated by the courts, presupposes that it is subject to exceptions; and when it appears, that the party proposed to be examined, is not responsible for the costs of the suit, and has no interest in the subject of dispute, and is willing to be sworn, he is not within the operation of the general rule.

Bills of exchange drawn in *New York*, upon a house in *London*, and there accepted and paid, if, in connexion with other circumstances, they create a claim by the acceptor against the drawer, are to be considered as creating one in *London*, which is the place of the contract.

A debt thus created in *London*, is not extinguished by a discharge of the debtor under the bankrupt act of the *United States*.

In a contest between two creditors of a discharged bankrupt, one of whom resided in this country, and the other in *London*, where the cause of action arose, the latter cannot prove by the bankrupt, his title to property hypothecated to him as collateral security, by the witness, who, still remaining liable to the foreign creditor, is interested in sustaining his claim for his own relief.

APPEAL from *Baltimore* county court.

On the 27th March 1837, the affidavit of *Benjamin I. Cohen*, of the firm of *Jacob I. Cohen, Jr., & Brothers*, that *Joseph L. Joseph*, *Solomon Joseph*, and *Moses Henriques*, citizens of *New York*, partners, under the firm of *J. L., and J. Joseph & Co.*, were justly indebted to *Jacob I. Cohen, Jr.*, &c., of the firm of *J. I. Cohen, Jr., & Brothers*, in the sum of $50,000, with an account for that sum, for money had and received for the use of *C. & Brothers*, were filed in said court, upon which an attachment issued against the goods, &c., of *Joseph & Co.* This attachment was laid upon five hundred and ten shares of the capital stock of the *General Insurance Company*, and two hundred and forty-seven shares of the capital stock of the *Canton Company*. The writ against the defendants, was returned *non sunt*.

At the return of the writ, *John N. Gossler*, *David W. Gantley*, and *John Ward*, claiming the property attached, interposed a plea, that it ought not to be condemned as the pro-

perty of *Joseph & Company*, and said, that the same were not of the goods and chattels of the said *J. & Co.* The plaintiffs, in the attachment, replied, that the property of the said stock was in the defendants, *J. & Co.*, at the time of laying the said attachment, on which issue was joined.

After a continuance, the plaintiffs prayed, that the sheriff should have leave to amend his return, which was granted, and the return was amended, so as to show a levy upon fifteen thousand shares of the capital stock of the *American Life Insurance and Trust Company*, on which the appellants claimed the stock, and pleaded, that one thousand shares of the stock, last mentioned, was not the property of *J. & Co.*

At a subsequent term, *Gossler* and *Gantley* withdrew their plea, and the plaintiffs replied to the other claimants, that the property in the stock, of the *A. L. I. & T. Co.*, was in *J. & Co.*, on which issue was joined.

The claimants then moved to quash the attachment, for various reasons assigned by them, which are sufficiently stated in the opinion of this court, and of which no disposition was made by the county court. Upon the trial of the plea, the jury found a verdict for the plaintiffs.

Exception. At the trial of this cause, the defendants, claimants of the one thousand shares of the stock of the *American Life Insurance and Trust Company*, being part of the property attached, in the case of *Cohen and others, against Joseph and others*, in this court, for the purpose of maintaining their title to said stock, offered as a witness *Solomon J. Joseph*, one of the defendants in the said attachment suit, and offered to prove, that the said witness, on the 6th December 1842, was duly discharged from all his debts, contracts and engagements, by a decree of the district court of the *United States*, in and for the southern district of *New York*, under and by virtue of the act of Congress, entitled, "an act to establish a uniform system of bankruptcy throughout the *U. S.*, passed August 19th, 1841, which said certificate is in the following words: "In bankruptcy.—In the matter of *Solomon J. Joseph*, a bankrupt.—At a district court." &c.

To the competency of which witness, the plaintiffs objected, and the court, (ARCHER, C. J., and PURVIANCE, A. J.,) sustained the objection, and refused to admit the said witness to be sworn; to which refusal the defendants excepted, and prosecuted the present appeal.

The cause was argued before DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By DAVID STEWART and MEREDITH for the appellants, and
By MCMAHON and REVERDY JOHNSON for the appellees.

MARTIN, J., delivered the opinion of this court.

It appears in this case, that a writ of attachment was sued out of *Baltimore* county court by the appellees, on the 27th March 1837, against the lands, tenements, goods and chattels, rights and credits, of *J. L.*, and *S. Joseph & Co.*, which was returned at the succeeding May term of the court, "attached as per schedule." At the September term of the same year, the sheriff, with leave of the court, amended his return, so as to include in the property attached, fifteen hundred shares of the stock of the *American Life Insurance and Trust Company.*

During the pendency of this attachment, at the January term 1838, the appellants interposed a claim and plea, to a thousand shares of the stock, alleging, that they were not the property of *Joseph & Co.* At the September term 1838, the appellees, as plaintiffs, filed a replication to the above mentioned claim and plea, on which issue was joined.

At the trial, the appellants, for the purpose of maintaining their title to the stock, offered as a witness *Solomon J. Joseph*, one of the defendants in the attachment suit, of *Cohen and others, against Joseph and others*, before referred to, and accompanied the offer with a copy of his discharge, under the bankrupt law of the *United States*, dated the 6th December 1842, certified by the clerk, under the seal of the district court of the *United States*, for the southern district of *New York*. This discharge, although not authenticated as required by the act of Congress, prescribing the mode in which instruments of

this kind are to be proved, was admitted without objection, and is, therefore, to be considered as properly in the cause.

In this posture of the case, the counsel for the appellees objected to the examination of *Joseph*, as an illegal and incompetent witness. The objection was sustained, and the witness excluded. And the single proposition presented for our determination, is, that which respects the correctness of the opinion thus pronounced by the court below, on this question of evidence.

It was not pretended, that *Solomon J. Joseph* was responsible for the costs of this suit. It appears from the record, that they were adjudged to be paid by the appellants. But the competency of this person, as a witness, was disputed on two grounds:

First. Because he was directly interested in maintaining, by his testimony, the title of the appellants to the stock in controversy; and

Secondly. That as this contest, between the appellants and appellees, was merely collateral to the attachment suit, *Joseph* was to be regarded as a party to the record, in the technical sense of that term, and being so, he was properly excluded from testifying on the objection in the abstract, that he was a party to the record, irrespective of the question of his responsibility for the costs, or his interest in the object of the suit.

We have seen that the discharge of *Joseph*, under the bankrupt law of the *United States*, though imperfectly authenticated, was to be treated as in evidence in the cause, and by adverting to the motion made by the appellants, for the purpose of quashing the attachment, it will be perceived, that the debt, for the payment of which this stock was hypothecated, was created by bills of exchange, drawn by the *Joseph's & Co.*, in *New York*, in favor of various persons, on *Lizardi & Company*, trading in *London*, and there accepted and paid.

Under such circumstances, the counsel for the appellees contended, that while the debt of the appellees was extinguished by the discharge of *Joseph*, under the bankrupt law, that of the appellants being a *London* contract, and not reached by the discharge, was not extinguished; and that he was, therefore, directly interested in supporting the claim of the appellants.

But, an insuperable answer to this view of the question, is, that looking alone, as this court is obliged to do, to the facts disclosed by the bill of exception, it does not appear that there was any debt due from *Joseph* to *Lizardi & Company*. And this being the position of the case, it is clear, that the witness, in upholding, by his testimony, the title of the appellants to the stock in dispute, would testify against his own interest. So far, then, as the question of interest was concerned, the witness was, in our opinion, clearly admissible.

The counsel for the appellees have, however, contended, that assuming that *Joseph* was neither responsible for the costs of this suit, or interested in maintaining, by his testimony, the title of the appellants to the stock claimed by them, yet being a party to the record, he was for this reason incompetent.

As it appears, that when the appellants proposed to swear *Solomon J. Joseph*, as a witness, he interposed no objection to his examination, and did not place himself, as he might have done, on his privilege of exemption as a party to the record, we must presume, that he was *willing* to testify; and this being assumed, and it having been established, that he was not liable for the costs of the suit, and that so far from being interested in sustaining the cause of the party by whom he was called, that his interest was to be found on the other side, we think, even if he was to be regarded as a party to the record, a proposition we do not consider it necessary to decide, that fact did not disqualify him from being a witness.

It is certainly true as a general rule, that a party to the record, is not a competent witness, for he is generally either interested in the object of the suit, or responsible for costs.

In the case of *Owings against Wright and Kent*, decided at the present term, this general proposition is announced. The court say:—"The general rule is, that a party to the record, cannot be examined as a witness."

In the case of *Willings and Francis, against Consequa, Pet. C. C. R.*, 307, *Judge Washington*, when speaking of an objection like this, to the competency of a witness, says: "The general rule of law certainly is, that a party to a suit, cannot be a witness. But it is equally so, that the interest

which that party has in the event of the suit, both as to costs and the subject in dispute, lies at the foundation of the rule, and when that interest is removed, the objection ceases to exist." It is manifest from the language of the Supreme Court, in *De Wolf against Johnson*, 10 *Wheat.*, 334, that they considered that the responsibility to which a party to the record is generally exposed in respect to the costs, if he had no interest in the event of the suit, was the reason why he could not be examined as a witness. The court say, in referring to the deposition of *Prentiss*:—"He may have had little or no interest in the event of the suit, except as to the costs; but still, while a party to the record, he could not be examined."

It will be seen, from an examination of the cases, that the form in which this rule of exclusion has been stated by the courts, presupposes that it is subject to exceptions. And when it appears, that the party proposed to be examined, is not responsible for the costs of the suit, and has no interest in the subject in dispute, and is *willing* to be sworn, he is not within the operation of the general rule.

The true and sound doctrine upon this subject, is to be found in the opinion delivered by *Chief Justice Tindall*, in the case of *Worrell against Jones*, 7 *Bing. R.*, 395.

He says, "that at the trial of this issue, the plaintiff proposed to call *Edward Jones* as a witness, to prove the continuance of the ancient tenancy. No objection could arise, on the ground that *Edward Jones* was interested to procure a verdict for the plaintiff, who called him. The witness did not, himself, object to be examined; but an objection was made on the part of *William Baker*, the defendant, who had pleaded; and the question reserved for our consideration, is, whether a defendant who has suffered judgment by default, and who consents to be examined, is an admissible witness, where he has no interest in the event of the suit; and the only objection to his admissibility is this—that he is a party upon the record? And upon this question, we are of opinion, that the evidence was admissible. No case has been cited, nor can any case be found, in which a witness has been refused, upon the objection in the abstract, that he was a party to the suit; on the contrary,

many have been brought forward, in which parties to the suit, who have suffered judgment by default, have been admitted as witness against their own interest; and the only enquiry seems to have been, in a majority of the cases, whether the party called was interested in the event or not; and the admission or rejection of the witness, has depended on the result of this enquiry. The exclusion on the ground of interest, is a known principle of the law of evidence; and so much did *Lord Chief Baron Gilbert* consider this as the only solid objection against the evidence of a party to the suit, that, after laying it down as a general rule, that no man interested in the matter in question, can be a witness for himself, he states, that several corollaries may be deduced from this rule; of which he gives as the first: that a plaintiff or defendant cannot be a witness in his own cause; for these are the persons who have a most immediate interest, and it is not to be presumed, that a man who complains without cause, or defends without justice, would have honesty enough to confess it. That a party to the record should not be compelled against his consent, to become a witness in a court of law, is a rule founded in good sense, and sound policy; it forms the point of the decision, in the case of the *King against Woodburn*, 10 *East.*, 395, and the decision of that case leads to the necessary inference, that if the party consents to be examined, he is then an admissible witness."

In the case of the *City Bank of Baltimore against Bateman*, 7 *H. & J.*, 109, the Court of Appeals say:—"That the admissions of a party on the record, are always evidence against himself, because, being a party, he cannot be *compelled* to give evidence against his interest in a court of law." Leading necessarily to the inference, that if he is called to testify against his interest, and consents to be examined, he is a competent witness.

The same doctrine is held by the court, in the case of *Lampton against Lampton*, 6 *T. B. Monroe*, 617; and in *Steele against the Phœnix Insurance Company*, 3 *Binnney*, 312, *Chief Justice Tilghman*, when examining this subject, says: "The reason of the law, is the life of the law. Now what good

reason is there, why a man's testimony should be excluded, merely because his name is placed on the record, as a party to a suit in which he has no manner of interest."

We think, both upon principle, and on authority, that the party proposed to be called by the appellants, was a legal and competent witness, and that the court below erred in excluding him.

We have already said, that the motion made by the appellants to quash the attachment, discloses the facts, that the debt, for the payment of which this stock was pledged, was created by a bill of exchange drawn in *New York*, by *J. L.* and *S. Joseph & Co.*, in favor of various persons, on the appellants, trading in *London*, and there accepted, and paid by them;—and as this case is to be returned on a *procedendo*, it is proper for the court to declare, what influence these facts, if they had been proved by the appellees, and incorporated into the bill of exception, would have had on the question of the competency of the witness.

It was contended by the counsel for the appellants, that as this bill of exchange was drawn in *New York*, it was to be regarded as a *New York* contract, and therefore covered by the discharge of *Joseph*, under the bankrupt law of the *United States*.

But to this proposition we cannot accede. On the contrary, we think it an established principle, that as this bill of exchange was accepted in *London*, and there paid by the appellants, *London* is to be considered as the place of the contract.

In the case of *Lewis against Owen*, 4 *B. & Al.*, 653, a rule was laid to shew cause why an *exoneretur* should not be entered on the bail piece, the defendant having obtained his certificate under a commission of bankruptcy in *Ireland*. It appeared from the affidavits, that the debt for which the action was brought, arose from the plaintiffs, while residing in *England*, accepting and paying bills of exchange, drawn upon them by the defendant, while residing in *Ireland*, for his accommodation.

The court said, the debt must be considered to have arisen where the money was paid; and that a certificate under a com-

mission of bankruptcy in *Ireland*, could not discharge a debt contracted in *England*. The same doctrine is established by the case of *Burrows against Jemimo*, 2 *Stra.* 73. *Story Conf. Law*, *Sec.* 274. *Chitty on Bills*, 736. *Story on Bills*, 163.

Treating *London*, then, as the place of the contract, it is clear, and indeed was not disputed, that the debt thus created, could not be reached and extinguished by the discharge of *Joseph*, under the bankrupt law of the *United States*. No principle of international law is more firmly settled, than that a discharge of this character can have no extra-territorial operation. The late *Judge Story*, in his able commentaries on the conflict of laws, speaks of the doctrine as well established:—that the discharge of a contract, by the law of a place where the contract was not made, or to be performed, will not be a discharge in any other country. *Conf. L.*, *Sec.* 283. *Smith vs. Buchanan*, 1 *East.*, 11. *Lewis vs. Owen*, 4 *B. & A.*, 654.

It follows from the views thus expressed, that if these facts had been proved at the trial, and made a part of the exception, the position of the witness must have been materially altered. Under such circumstances, while his discharge under the bankrupt law, would have operated upon, and extinguished the debt of the appellees, it would have have left unaffected that of the appellants, and he would have been directly interested in maintaining by his testimony, the claim and title of the appellants, and therefore inadmissible.

In the form in which the case is now presented to us, we reverse the judgment of the court below, with costs, and order a procedendo.

JUDGMENT REVERSED AND PROCEDENDO ORDERED.

N. H. Ellicott, Adm'r of Samuel Ellicott, *vs.* B. H. Ellicott.—*December* 1845.

Where a testator devised his estate to his children, share and share alike, but declared, that if his son should elect to carry on the business in which the father was then engaged, he should have for that object his entire estate, and in that event, pay his brothers and sisters, at a valuation which the will directed to be made; and the son so elected, and took the estate, all the debts being paid, the testamentary bond of the executor is discharged.

APPEAL from the Orphans Court of *Baltimore* county.

On the 28th February 1845, *Benjamin H. Ellicott* filed his petition, alleging, that in March 1839, *William E. George* died, leaving a last will, devising his estate to all his children; but directed, that if his son, *Philip T. George*, desired to carry on the business in which the testator was engaged, he should have his whole real and personal property for that purpose, being accountable to his brothers and sisters for their shares; and constituted *Eliza George*, *P. T. George*, and said *Benjamin H. Ellicott*, his executors; that the two latter only qualified, and gave as securities, *Samuel*, *Andrew*, and *J. H. Ellicott;* that *P. T. G.*, elected to take the real and personal estate, in accordance with the power of the will; that *Samuel Ellicott*, one of the sureties, aforesaid, died on the 13th December 1842, intestate, leaving a valuable real and personal estate, and seven children, of whom the petitioner is one; that *Nathaniel H. Ellicott*, one of his brothers, administered upon his father's estate. Prayer, that *N. H. E.* may distribute that estate.

The answer of *Nathaniel H. Ellicott*, alleged, that he did not insist, that the estate of his intestate must be held as security, for the faithful performance, by the executors, of *W. E. G.*, for their duties as such, but that such view of the responsibility of the estate of his intestate is taken by others; that he has been informed that able counsel are of that opinion; that a distribution of his intestate estate has not been made, is to be attributed, exclusively, to the circumstances stated in the petition, and this answer.

A second petition was filed by *John D. Early and wife*, legatees and distributees of *William E. George*, alleging, that they had not been paid, and that a large balance was due them; that they have sued the executors of *W. E. G.*, and their securities, for the money due them; that their action was then pending; that the estate of *Samuel Ellicott* was still liable to them. Prayer, that the distribution of his estate may be restrained, till the further order of the court, and for general relief, &c.

The will of *W. E. George*, amongst others, contained the following clauses :—

"I devise all my real and personal estate, wheresoever situated, to my children, *Eliza*, *Philip T.*, *Ann*, *Jonathan E.*, *Robert*, *Sarah H.*, *Francis E.*, *Mary Ann*, and *William E. George*, their, and each of their heirs and assigns, share and share alike."

"It is further my will and desire, that my real estate, and personal estate, shall not be sold, but that the value of the personal property and estate, and debts, shall be ascertained in the usual manner, and by appraisement, and the value of my real estate by my executors."

"It is further my will, that if my son, *P. T. G.*, desires to carry on the business in which I am now engaged, he shall have *the whole of my real and personal estate*, for that purpose, being accountable to his brothers and sisters for their shares of my estate, in the following manner; that is to say, he shall pay to my daughters, *Eliza* and *Ann*, immediately after my decease, and to my other children, as he or she shall arrive, if males, at the age of twenty-one, and if females, at the age of eighteen years, such sum as shall be equal to one-ninth part of my whole estate, the value thereof estimated as aforesaid, excluding, however, from participating in such valuation, my son, *P. T. G.*, whom I intend making one of my executors."

"It is further my will, that if my son *Philip* shall elect to carry on my business, as aforesaid, and pay to his brothers and sisters as above particularly provided for, then he shall have to himself, his heirs and assigns, the whole of my said estate, real and personal, to dispose of as he pleases."

The election of *P. T. G.*, to carry on his father's business, and take the estate at the appraisement under the will, dated 8th August 1839, was filed in the Orphans court.

It was admitted, that the debts due from *W. E. George*, were paid by his executor, *P. T. G.*; that the debts due from *Samuel Ellicott* were paid.

The Orphans court, (Kemp, C. J., and Readel, A. J.,) decreed, that the said *P. T. G.*, having made his election under his father's will to take his estate, the testamentary bond

on that estate was not responsible to his children; that no part of the estate of *Samuel Ellicott*, ought to be retained to meet liability on that bond, and that *N. H. Ellicott*, administrator, proceed to distribute and deliver up the personal estate of his intestate, *Samuel*, &c.

From this decree, *N. H. Ellicott*, administrator, appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, MAGRUDER and MARTIN, J.

By R. JOHNSON for the appellants, and
By G. L. DULANY for the appellee.

MAGRUDER, J., delivered the opinion of this court.

This was an application by the defendant, one of the representatives of *Samuel Ellicott*, to order the administrator of the latter, to make a distribution of his estate. The administrator appeared, and in his answer objects to the distribution, upon the ground, that his intestate was security in the bond given by the executors of one *William E. George*, and as such, may be answerable to a large amount.

Upon the same ground, the distribution of the estate of *Samuel Ellicott*, is resisted by one of the children, and a legatee of the said *George*. Upon no other ground is the distribution opposed. Indeed, it is admitted, that all other claims against *S. Ellicott*, except to a very inconsiderable amount, have been discharged.

The will of *George* is introduced into the record, which also furnishes evidence, that *Philip T. George*, the executor, has accepted of the estate, upon the terms mentioned in that will. This court is of opinion, that the children of *William E. George*, have no claim on the bond given by his executor, and, therefore, the matters stated in the answer, furnish the executor with no reason for delaying to distribute the estate of the said *Samuel Ellicott*.

DECREE AFFIRMED WITH COSTS.

The Bank of the Metropolis *vs.* Dennis G. Orme.—*December* 1845.

The objection, that a corporation sues by a wrong name, is matter of abatement, and cannot be taken upon the trial of the general issue.

Appeal from *Anne Arundel* county court.

This was an action of *assumpsit*, brought on the 29th June 1840, by the appellant against the appellee, who pleaded *non assumpsit*.

At the trial of this issue, after proof offered on both sides, the defendant prayed the court to instruct the jury, that the plaintiff was not entitled to recover in the present action, because the suit was not instituted in the true corporate name and style of the plaintiffs, and the court, (Dorsey, C. J., and Wilkinson, A. J.,) being of that opinion, so instructed the jury. The defendant excepted, and prosecuted this appeal.

The cause was argued before Archer, C. J., Chambers, Spence, Magruder and Martin, J.

By J. Johnson and W. Schley for the appellant, who maintained:—

That the corporate name used was right, under the acts of Congress, of 1817, chap. 93, sec. 23, 24; and 1821, chap. 18; 1836, chap. 260; 1838, chap. 191. They also maintained the name to be sufficient, and that the objection relied on, could only be taken in abatement, and before plea, pleaded. They cited *Angel & Ames on Corp.*, 55, 377. 1 *Barn. & Ald.*, 699. 7 *Mass.*, 441. 2 *Harr. & Gill*, 478, 493. *Kidd on Corp.*, 283. 1 *Chitt. Pl.*, 440. 2 *Cowen*, 778. 10 *Mass.*, 360. 4 *Peter's S. C.*, 480, 501. 6 *Peter's S. C.*, 230, 231. 6 *Eng. Com. Law*, 9. 6 *Maul. & Sel.*, 45. 2 *W. Black*, 1120. 10 *Coke*, 125. 6 *Peter's S. C.*, 642, *(note.)* 1 *Boss. & Pull.*, 40. 1 *H. & J.*, 548. 3 *Camp.*, 29.

By Randall for the appellee, who maintained:—

That the acts of Congress cited, all showed that a wrong name had been adopted. That a corporation, plaintiff under

the general issue, was bound to show its charter, and that any variance between it and the writ, constituted a difference in the plaintiff, and fatal. 5 *H. & J.*, 122.

SPENCE, J., delivered the opinion of this court.

We deem it unnecessary in this case, to decide, whether the corporate name of the bank be, *The Bank of the Metropolis*, or, *The President and Directors of the Bank of the Metropolis;* for the reason, that the decision of this question can have no influence on the conclusion to which we come.

The second point raised by the counsel for the appellant, is, that the objection, (if a good one,) raised by the defendant's prayer, could only have been made successfully by a plea in abatement.

The name of the plaintiff, both in the writ and declaration, is, "*The Bank of the Metropolis.*" If the corporate name of the bank be, *The Bank of the Metropolis*, the judgment of the court was manifestly erroneous.

But, suppose the corporate name of the bank is, *The President and Directors of the Bank of the Metropolis*, the objection is not, that there is no such corporation, but, that the name used in the declaration and writ differ, partially, from the true name of the corporation; and the point upon which the decision must turn, is, whether this variance can be taken advantage of by pleas in bar, or only by plea in abatement.

It was once a question, whether a mistake of the name of a corporation, could be successfully pleaded in abatement. *Mr. Chitty* says, it was once doubted, but that it is now settled, that the mistake must be pleaded in abatement. 1 *Chit. Pl.* 391.

"A mere misnomer of a plaintiff, whether a body politic or natural, is pleadable only in abatement; for a new writ may be taken out by the right name; but, if the existence of the person or corporation be denied, the plea is in bar: for if there be no such person or corporation, there is an end of the action." 1 *Bac. Abridg.*, 33, (*Edit.* 1842.)

We are, therefore, of opinion, that the court erred.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

FRANCIS J. DALLAM, SAMUEL BRADY, AND THE MAYOR AND CITY COUNCIL OF BALTIMORE, *vs.* R. OLIVER'S EXECUTORS.—*December* 1845.

Taxes levied for the city of *Baltimore*, on real estate, prior to 1840, ch. 63, are not liens on the land, where there is a sufficiency of personal property on the premises taxed, to pay the same.

The act of 1840, chap. 163, which authorised the city of *Baltimore* to provide, by ordinance, for the prompt collection of taxes due the city, and to that end, may and shall have power to sell real, as well as personal property, will not be so construed, as to have a retrospective effect.

APPEAL from the Equity side of *Baltimore* county court.

On the 14th June 1841, the executors and devisees of *Robert Oliver*, filed a bill against *M. Winchester and others*, to enforce a vendor's lien, for unpaid purchase money of land sold, and obtained a decree for a sale by a trustee.

On the 7th May 1842, *Francis J. Dallam*, collector of the city of *Baltimore*, filed a bill for taxes due on the land sold to the *Mayor and City Council of Baltimore*, for the years 1833, 1834 and 1835, supported by affidavit.

On the 25th, *Samuel Brady*, another collector, filed a similar bill, for the years 1837 and 1838.

On the 30th September 1842, the trustee reported a sale, which was finally ratified, and confirmed on the 16th November of that year.

The trustee was then ordered to pay the taxes claimed, unless cause to the contrary be shown, &c., after notice, as prescribed.

The complainants in the cause, excepted to the payment of the taxes claimed :—

1. Because the same are no liens upon the land sold by the trustee.

2. That the claims are barred by limitations.

The claimants then gave proof, that *G. Winchester*, the tenant in possession, promised to pay the taxes aforesaid, within two or three months of his death, in 1839.

It was admitted, that during *Mr. Winchester's* time, there was always personal property of said *Winchester*, sufficient to pay these taxes; and that he died in *August* 1839; that

there was personalty sufficient for the payment of the tax bills upon the property, at the time the taxes became due, and for a long time afterwards; and that a judgment was recovered in *Baltimore* county court, in the name of *The Mayor and City Council*, on the 6th September 1836, for the taxes of 1833, which is yet unsatisfied.

On the 13th October 1843, the county court, (MAGRUDER, A. J.,) decreed as follows:—

No petition has been filed in relation to these claims; but the question as to the liability of the fund in court, arising from the proceeds of sale of real estate, and that estate being the property upon which these taxes were imposed, has been submitted after argument for decision.

It was conceded by the counsel, who argued in support of the right to claim against the fund for these taxes, and an admission of that fact has since been filed, that there was at all times, from the date of the imposition of those taxes, until the death of the late *George Winchester*, a sufficiency of personal property on the premises, which could be made liable for the payment of them, and it thence follows, necessarily, that there is no ground to charge the land with the payment of those taxes, *Mayor and City Council of Baltimore vs. Ann Chase*, 2 *Gill & John.*, 381, unless the act of 1840, chap. 63, can be construed to extend to taxes laid before its passage, and to be intended by the legislature, to operate retrospectively.

It is not meant to deny the right of the legislature to have passed such an act, provided they had clearly so expressed such intention; but in the absence of any such expression, we must adhere to the rule adopted by the courts in the exposition of statutes, that they are to be construed to apply only to cases after their passage.

As the law stood, when those taxes were imposed, there could be no lien upon the land, because there was at all times a sufficiency of personal property on the premises, to satisfy the amount of taxes.

The claims, then, must be disallowed, as against the fund in court, and the claimants must pay the costs arising upon

their proceeding in this cause, for the recovery of the same out of that fund, and the clerk is to tax the same.

From this decree the claimants appealed.

The act of 1840, ch. 63, declared, that *The Mayor and City Council of Baltimore*, may and shall have full power to provide, by ordinance or otherwise, for the prompt collection of taxes due to the city of *Baltimore*, and to that end, may and shall have power to sell real, as well as personal property, any thing in any act of Assembly to the contrary notwithstanding.

The cause was argued before ARCHER, C. J., DORSEY, MAGRUDER and MARTIN, J.

By CAMPBELL for the appellant, and
By GLENN for the appellee.

BY THE COURT— DECREE AFFIRMED.

THE FARMERS BANK OF MARYLAND *vs.* LEONARD MACKALL AND FRANCIS TILTON.—*December* 1845.

Upon a creditor's bill, for the payment of a mortgage and other debts, the lands of a deceased debtor, was decreed to be sold by a trustee appointed for that object. The trustee made and reported a sale. The funds raised in that mode being insufficient, a contribution was directed to be levied upon the devisees of the debtor, at their request, for the balances due certain specified creditors, which was done, and the accounts stated, both with the trustee and devisees, confirmed. After this, some of the devisees paid their contributions to the trustee, who wasted that part of the funds, and died insolvent. A second trustee was appointed, who collected the balance of the contributions. HELD :—

1st. That this last balance, was to be distributed rateably among the specified creditors in the contribution account.

2nd. That the first trustee had no authority, either under the original decree, or the ratified accounts, to receive the same.

3rd. That the claim of the complainant, who obtained the decree, was not affected by such payment to the trustee, although the trustee was his solicitor. Neither was that of a mortgagee, of the land decreed to be sold, though it included that belonging to the contributing devisees.

Equity will not sanction what was done without authority, though it would have ordered it to be done, where it endangers the interests of parties interested in the act.

The relation of a solicitor to the complainant in the cause, where the former is appointed a trustee, to make a sale by decree, becomes dormant when the decree is obtained. The solicitor, when he was appointed trustee, assumed a new character. Unauthorised receipts of money by the trustee, will not be sanctioned in virtue of any supposed relation of client and attorney.

An attorney, after judgment or decree, has power to collect the debt by execution.

Appeal from the Court of Chancery.

On the 19th January 1824, *James McCormick*, by *John Scott, Esq.*, his solicitor, filed his bill in chancery against *Fayette Gibson; The Farmers Bank of Maryland; James Tilton and wife; Clara Tilton and others*, claiming to be a creditor of *Jacob Gibson*, deceased, and having a lien on his real property; the defendants being devisees and mortgagees of the deceased debtor.

On the 13th May 1836, the Chancellor, (Bland,) decreed, that the real estate of *Jacob Gibson*, deceased, or so much thereof as may be necessary, be sold for the payment of the mortgage claim of the defendants, *The Farmers Bank of Maryland*, and the claim of the complainant, as stated in the bill, and all other debts due from the said deceased; that *John Scott* be appointed trustee, &c. Notice was ordered to be given to creditors, &c.

An appeal was taken from this decree, the result of which will be found stated in — *G. & J.*

After the cause was remanded, the trustee, on the 2nd April 1839, made a report of his sales, to amount of $15,637.36; and on the 5th June 1839, the sales were finally ratified.

After a variety of interlocutory proceedings, the auditor, on the 11th March 1841, reported an account A.—*Dr.*, *The Real Estate of Jacob Gibson, deceased, in account with John Scott, Trustee, Cr.*, in which the estate was charged:—

1. With costs, commissions, &c., - -	$1,718 21
2. With the mortgage of the *Farmers Bank*,	10,869 82

Carried forward,

Brought forward, - -	$12,588 03
3. With *Jas. Tilton's* life interest in his wife's equity, as sold, $\frac{3}{17}$ of $\frac{1}{4}$, - -	584 30
4. With the complainant, for his proportion of *Mrs. Tilton's* equity, - -	275 42
5. With the complainant's proportion of *Edward Gibson's* devise, - - -	1,266 06
6. With the complainant's proportion of *Fayette Gibson's* devise, sold to *Lloyd*, -	379 79
7. With the complainant, for the balance of *Mrs. Tilton's* equity, - - -	525 76
The amount of sales reported,	$15,619 36

The auditor also stated an account B, in which the real estate of *Jacob Gibson* was debited:—

1. To the *Farmers Bank of Md.*, - -	$1,084 52
2. To *James McCormick*, the complainant,	981 72
3. To *Mrs. Tilton*, - - - -	997 83
	$3,064 07

And credited as follows:—

By this sum, due from *Reynolds and wife*,	$2,230 60
By this sum, due from *Mrs. Bennett's* heirs,	533 47
By this sum, due by *Lloyd*, for costs,	120 77
By this sum, due by *Blake's* heirs, for costs,	179 23
	$3,064 07

On the 29th April 1841, the Chancellor confirmed both these accounts, and directed the trustee to apply the proceeds accordingly, with a due proportion of interest, that has been or may be received.

On the 29th September 1841, *Leonard Mackall* had leave to appear in the cause, as administrator of *James Tilton*, deceased.

On the 14th April 1842, *Frances Tilton*, one of the defendants in this cause, filed her petition, alleging, that since the decree passed herein, a considerable part of the real estate of

her father, the late *Jacob Gibson*, has been sold by the trustee, for that purpose appointed; and amongst other property, that part devised to *Fayette Gibson*, that devised to *Edward R. Gibson*, and that devised to your petitioner; that after said sales were made, the auditor of this court, by his reports, dated on the 8th and 11th March 1841, distributed the proceeds of sale amongst the parties properly entitled, as will particularly appear by his accounts, marked A and B, accompanying his said report; that by those accounts, which were finally ratified and confirmed by your honor, the whole of your petitioner's equity of redemption, was applied to the payment of the claim of the then complainant, *James McCormick*, after deducting the life estate of your petitioner's then husband, since deceased, and her right was recognised to be substituted for the said *McCormick*, to the extent of such application of her equity of redemption, over and above the share or portion of said debt, which her property would be eventually bound to pay, or would have been bound for, if all the real estate of the said *Gibson* had been sold, and the proceeds thereof brought into court for a proper distribution. Your petioner further shows, that by account B, accompanying said report of the auditor, and which was confirmed, as aforesaid, the several sums to be paid by the other parties to this cause, or for which the estate of *Jacob Gibson*, in their hands, was answerable, was fixed and ascertained in the following manner, viz: that devised to *Anne Reynolds*, was ordered to pay $2230.60; that devised to *Harriet Bennett*, was ordered to pay $533.47; that part devised to *Fayette Gibson*, and sold to *Edward Lloyd*, was ordered to pay $120.77; that part devised to *Fayette Gibson*, and sold by him to *John W. Blake*, was ordered to pay $179.23; making in all the sum of $3064.07; for which the said estate of the said *Gibson* was still responsible, after the application of the proceeds of the sales, at that time effected by the trustee; that by the same, the said sum of $3064.07, was to be applied as follows, namely, to the payment of the remainder of the complainant's claim, the sum of $981.72; to the payment of the remainder of the mortgage debt of the *Farmers Bank of Maryland*, the sum of $1084.52; and to your petitioner, by substitution, the sum of

$997.83. That after the order passed by your honor, on the 29th April 1841, confirming the auditor's said accounts, A and B, it became the duty of the trustee, forthwith to sell such part of the real estate of the said *Jacob Gibson*, as was in the possession of the several parties, answerable, as devisees, for the several sums of money to be distributed, as per account B, unless they severally paid the sum assessed thereupon; but this he has neglected to do, and in consequence thereof, your petitioner has been deprived of her just portion of said sum of money, after her estate had been sold and consumed in the payment of debts, for which the other devisees, and their assignees, were justly responsible.

Your petitioner further shows, that when she last applied to the said trustee, he alleged as a reason why he could not proceed, that the complainant, *James McCormick*, had departed this life, which your petitioner now avers to be the fact, and whose death she now, therefore, suggests; and she further alleges, that since his death, *John McCormick* had taken out letters of administration upon his estate, as will appear, and whom she prays may, by proper proceedings, be made a party to this cause, in lieu and stead of the said *James McCormick*, and that the said suit may stand revived. Your petitioner further suggests, that since the ratification of the said accounts, A and B, *Edward R. Gibson*, one of the defendants, and a devisee of the said *Jacob Gibson*, has also departed this life, leaving the following children and heirs at law, namely, *Rebecca*, who has intermarried with one *Jacob Smallwood*, *Jacob Napoleon*, *Hanson*, *Emily Eugene*, and *Janette Gibson*, all of whom reside out of the State of *Maryland;* but your petitioner submits, that it appears from the proceedings in this cause, and particularly from the deed from the said *Edward R. Gibson* to the defendant, *Fayette Gibson*, filed on the 19th January 1834, marked LG, No. 6, and returned with a commission on the 5th April 1834, from the deed from *Fayette Gibson* to *Edward R. Gibson*, returned with a commission, and filed on the 5th April 1834, marked LG, No. 7, from the decree passed on the 8th November 1826, taking the bill as confessed against the said *Edward R. Gibson*, and from said accounts A and

B, wherein the proceeds of the devise to *Edward R. Gibson*, have been applied under an order of this court; that the interest of the said *Edward R. Gibson*, and his heirs, are merely nominal, and she therefore prays, that the said trustee may be ordered and required to proceed in the execution of his trust; and the said *John McCormick*, as administrator of the said complainant, *James McCormick*, may be made a party to these proceedings, in lieu of the said *James;* and your petitioner further prays, that the said trustee may be ordered to report what sums of money he has received from the purchasers, at the several sales made by him, and what he has received from any of the parties in this cause, &c.

On the 15th April 1842, the Chancellor ordered that the suit be revived against *John McCormick*, administrator of *James McCormick*, provided a copy, &c.; and that upon the said *John* becoming a party to these proceedings, the trustee forthwith proceed to close his trust, and report to this court as prayed; provided, also, a copy, &c.

John McCormick, by his answer, after a reference to the petition, which he admitted to be true, suggested for the consideration of the Chancellor, "whether the petition of the said *Frances Tilton*, is according to the rules and practice of this honorable court, and whether the proceeding by a bill of revivor and supplement, to which he hath referred, is not the proper course and remedy to be used and adopted in such cases; that he has heard, and believes it to be true, that *Edward R. Gibson*, one of the original defendants in the said cause, and a devisee of the said *Jacob Gibson*, hath departed this life, leaving children and heirs at law, as hath been stated, and that they reside out of the State of *Maryland;* and submits to the consideration of the Chancellor, whether it is necessary that they should be made defendants to the proceedings, now about to be had in the said cause in this honorable court, &c.

John Scott, Sol. for Def't. JOHN P. MCCORMICK."

On the 21st May 1842, the Chancellor directed, that the order of the 15th April, be made absolute, without prejudice to the said *John P. McCormick's* bill of revivor and supplement, that the cause stand revived, and that the trustee forthwith report, and proceed as directed by the order of the 15th April last.

On the 19th October following, the trustee being in default, he was removed, and afterwards, *Henry C. Mackall* appointed in his place.

On the 9th June 1843, the second trustee reported, that there remained due the sum of $518.38, which he had received from *Wright*, one of the purchasers under the decree.

That the heirs of *Bennett*, upon whom, by the auditor's report of 8th March 1831, was levied, as their portion of the general fund, the sum of $533.47, paid on the 27th March 1839, the sum of $1000 to the former trustee.

That the sum of $120.77, levied upon *Lloyd*, for costs, had been also paid to the former trustee.

That of the sum of $2230.60, levied upon *Joseph Reynolds and wife*, there had been paid to the former trustee, on 27th March 1839, the sum of $1423.50, leaving a balance then due of $806.02, which last mentioned sum with interest, $1064.16 has been received by the present trustee from the executors of *Reynolds*.

That the sum of $216.34, principal and interest, levied upon *Blake*, had been received from the sales of his estate by the present trustee, and that the said sums are now in hand, &c. The Chancellor ordered them to be deposited in court, which was done.

On the 18th December 1843, *The Farmers Bank of Maryland* filed their petition, and alleged, among other matters, that by the auditor's accounts ratified, there had been assigned to them out of the proceeds of the sales of the real estate, in part payment of their claim, - - - $10,869 82

Of which they have received, by a set-off of their purchase, - -	$10,500	
Reduced by their payment to the trustee, *J. S.*, - - - - - -	500	10,000 00
Leaving due to them of the proceeds of sales on this account, - - - - -		869 82
And on account of their costs of suit, - - -		68 60
And on account of the sum assigned them, to be paid by the parties, as per account B, - -		1084 52
Making an aggregate due the bank, - -		$2022 94

after paying off the purchase money aforesaid; that *John Scott*, from time to time, promised to execute a deed to them for their purchase, but neglected so to do; that afterwards, *H. C. M.* was appointed trustee, to complete said trust, who hath accepted the same, but he declines setting off the bank's purchase against so much of their claim, and executing a conveyance therefor, without the authority of this court. That said *H. C. M.*, as trustee, did, on the 9th June last, deposite in court to the credit of this cause, $1498.42, as will appear, &c. They pray, that a check for the said sum, to be paid to their solicitor, and that *H. C. M.* may make said set-off and conveyance, &c.

On this petition, the Chancellor, on the 18th December 1843, referred the cause to the auditor, with directions to distribute the money now in court, in due proportion, assuming the validity of the claims, as heretofore affirmed by the orders ratifying the accounts heretofore stated.

A receipt of *John Scott*, trustee, was filed in the cause, dated 1st March 1839, for $1000, received from *Dr. L. Mackall*, who intermarried with *Frances Ann Bennett*, one of the children of *Harriet*, daughter of *Jacob Gibson*, and devisee under his will, to be accounted for by him, as trustee, for the sale of *J. G's* estate for the payment of his debts, and to be applied under the directions of the Chancellor.

On the 10th April 1844, the auditor reported three accounts, C, D and E.

In account C, which was between the estate of *J. G.*, and *John Scott*, trustee, the former was credited with the whole amount of sales, $15,210.24. Amount paid by *Dr. L. Mackall*, less commissions, $942; the sum paid by *Reynolds*, $1423.50, and that by *Lloyd's* heirs to him, $120.77, in all, $17,696.51; and debited with the debts of the bank, *James Tilton* and *James McCormick*, which nearly paid them in full.

Account D was stated between the same estate, and *H. C. M.*, trustee, and credited the estate with the sums received from *Wright*, *Reynolds*, and the heirs of *Blake*, $1798.88, and debited, with costs, the small balances due the claimants in account C; the balance, $1439.06, as follows, to *L. Mackall*,

$418.03; to *Mrs. Tilton*, $1021.03, for amount assigned her in account B.

Account E, between the same as account D, credited with same amount, and debited with costs, $351.22; also a dividend on $1954.34 to *Farmers Bank*, $511.23. *James Tilton*, a dividend on $133.11, $34.82; and *James McCormick*, for account of his claim in A and B, $3446.75, with a dividend of $901.61.

The parties respectively excepted to these accounts; the bank and *McCormick* claimed the fund, as adjusted in the account E, which was for the balance due them, after allowances for payments to them by the first trustee. The other parties claimed, as per account D.

On the 25th July 1844, the Chancellor, (BLAND,) ratified account D, and directed the funds to be paid accordingly, and the *Farmers Bank of Maryland* appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MARTIN, J.

By RANDALL for the appellant, and
By MCLEAN and WORTHINGTON for the appellees.

ARCHER, C. J., delivered the opinion of this court.

The order of the Chancellor, appealed from, could only be sustained on the assumption, that the former trustee rightfully, as trustee, received the various amounts required by account B, to be contributed by the devisees of *Jacob Gibson*.

If these sums were rightfully received by the trustee, to the extent of the bank's proportion of such payment, the claim of the bank must be considered as extinguished.

But the decree, under which the trustee acted, created no responsibility on the trustee, in relation to these contributions. It did not make it his duty to receive them, and we do not think, that any order passed in the case, has created such responsibility; such a consequence cannot be ascribed to the Chancellor's order, of 15th April 1842, on *Tilton's* petition, which requires the trustee to report the sums received from the sales

of the land, and from the parties to the suit. The Chancellor, when the trustee should have made his report, was left to pursue such course, in confirming or rejecting what the trustee had done, after the report should have come in, as, in his judgment, might have in the most proper manner dispensed justice between the parties, untrammelled by his order above referred to.

What would be the consequence of the trustee's refusal or neglect to report, in pursuance of the order of the Chancellor, it is unnessary to state, further than to say, that such disobedience did not create a liability on the part of the trustee, under his bond, for the amount of the above referred to contributions, which had been paid to the trustee, without authority from the Chancellor to receive them; and which, in the then state of the cause, should have been paid by the contributors, into the Court of chancery, by authority of that court.

Nor, in our opinion, does the order of the Chancellor of the 14th April 1841, whereby he confirmed accounts A and B, in any manner sanction the receipt, by the trustee's, of these contributions. The order, so far as it directs the trustee to pay over the proceeds accordingly, must be considered as having reference to the proceeds of sale, acknowledged by the trustee in his report to have been received. Account B, which is confirmed, is not an account of the real estate of *Jacob Gibson* with the trustee, but an account with sundry persons, who, choosing to be contributors, might exempt their lands from sale under the decree; and the credit side of this account shows, that the fact of any previous payment having been made, was not disclosed to the Chancellor; on the contrary, the sums placed to the credit of that account, are stated to be *due* from the persons therein. Besides, no commissions are allowed in account B, which is fair to infer, would have been allowed, if this order had meant to sanction the receipt, by the trustee, of these contributions; and looking to these facts, it is quite impossible to consider the confirmation of these accounts as conferring any authority on the trustee, to have received these contributions. If it had been deemed important to have paid these contributions, an order should have been obtained, autho-

rising the trustee to have received them; or they might have been paid, with the sanction of the Chancellor, into court. As no such order was applied for, the receipt of these contributions by the trustee, was wholly without authority, and can in no manner affect the persons in this cause, to whom, if rightfully paid, they would have been due.

Had the money remained in the hands of the trustee, and so appeared by his report, the Court of chancery would, doubtlessly, have sanctioned such payments, and distributed them according to the equities of the respective parties; but if it be true, as suggested, that the amounts thus received by the trustee, have been by him wasted, we cannot conceive that equity, by sanctioning what was done without authority, would endanger the interests of the parties having claims on such contributions.

We do not mean to intimate by any thing we have said, that if the Chancellor had sanctioned, as contended, by his order the receipt of the funds, after the same had been wasted, that such order would have been conclusive on the parties.

The sum now in court for distribution, is made up of the balance due on the sale of *Marengo*, and of contributions made by sundry persons, whose names are mentioned on the credit side of account B. The proceeds of sale, and of these contributions, were rightfully appropriated by accounts A and B: which have been ratified. Exceptions thereto having been overruled, and the fund in hand must be applied, (as what has heretofore been received of the purchase money, may have been wasted, or in danger,) to all the creditors and others, in accounts A and B, to whom such money was awarded, in due proportion, having regard to the respective amounts due to said claimants, as appear by the above referred to accounts.

So far as the fund for distribution, consists of the purchase money for the lands sold by the former trustee, that must be distributed among the persons in account A, to whom the purchase money was distributed; and so far as the same consists of money paid to the trustee by the contributors, that must be distributed among the persons, to whom, by the account B, the contributions were assigned; and the said distributions are to be

made by the rule just designated. If the entire funds have not been wasted, but the trustee has made payments, to some extent, to the claimants, then, in making distribution of the fund in court, such sum as shall be found to have been paid, shall be taken into account; and in such case, such claimant shall be excluded, if it be found, that he has received more than he would have received, if all the funds had been wasted and the fund was distributed; as in such case, has been above directed.

There is nothing, in our judgment, which should prevent *McCormick* from obtaining his due proportion of the funds in the hands of the trustee. He had sought redress, in a court of equity, for the recovery of his claim, and the former trustee was his solicitor—but the relations between him and his solicitor, so far as is disclosed by any evidence on the record, became dormant when the decree was obtained; and the solicitor, when he was appointed trustee, assumed a new character, and incurred the responsibilities attendant upon such newly assumed character. *McCormick* was, certainly, not afterwards bound by any act which he might do, or omit to do, either as a trustee or an individual; and might seek redress for any violation of his duty as trustee, on his bond, or against him, individually, for any act of wrong he may have committed without the scope of the bond; and we cannot perceive that he is to be treated as assenting to any unauthorised receipt of money by the trustee, in virtue of any supposed relation of client and attorney. It is not meant to be intimated, that an attorney, after judgment or decree, has no power by execution to collect the debt; but after decree, if the attorney becomes a trustee, and either, as trustee, receives the money, or it is paid to him, in that character, and received by him, as was done in this case, under color of his office as trustee, such payment to the trustee, is not a payment to the complainant. It has been suggested, that *John Scott*, as solicitor for *McCormick*, filed his answer to *Tilton's* petition, but this was long after the unauthorised receipt by the trustee: the answer having been filed on the 19th May 1842, and the money received by the trustee in March 1839.

By the account, which has been confirmed by the Chancellor, and which is appealed from in this case, after paying the costs and expenses of the present trustee, the money received by the present trustee is applied, to make good to the contributors over-payments made by them; while the creditors, and others, are made to *lose*, by the admitted defalcations of the former trustee. We cannot perceive any principle of equity, which would, under such circumstances, place one creditor on higher ground than another; nor can we conceive why he, who without authority has over-paid his contribution, should, for reimbursement, obtain compensation from what has been saved, while the creditors, whose claims had been allowed, and properly allowed, are thrown upon the possible chance of recovering their claims from a trustee's estate, which is admitted to be insolvent.

The order of the Chancellor appealed from, is reversed, and the cause remanded to the Court of chancery.

ORDER REVERSED AND CAUSE REMANDED.

The Mutual Safety Insurance Company *vs.* Esdale P. Cohen.—*June* 1846.

Where a vessel insured was, by one of the perils insured against, so far damaged, that under all the circumstances attending her situation consequent on said injury, it was necessary, *in the opinion of the jury*, for the interest of all concerned, that she should be sold, and that under such necessity, she was, in good faith, sold by order of a court of admiralty, decreeing salvage, the assured is entitled to recover for a total loss, although the jury may find, or the court be of opinion, that there was no valid abandonment by him.

If there be an urgent necessity for the sale of an insured vessel, damaged by the perils of the sea, the master, as agent, both of the insured and underwriter, has a right to sell the vessel, and such sale constitutes a total loss, for which the underwriters are responsible; and if the jury find such necessity, there is no obligation on the part of the assured to abandon.

Where a variety of prayers were submitted to the court by the plaintiff and defendant, and the instruction given by the judge to the jury, covered the whole ground of controversy, the judgment will not be reversed, though some of the prayers refused, were in themselves correct.

APPEAL from *Baltimore* county court.

This was an action of *assumpsit*, brought against the appellants, a foreign corporation, incorporated by the State of *New York*, on 31st December 1842. The company appeared, and pleaded *non assumpsit*.

At the trial of this cause, the plaintiff, to prove the issue on his part, offered in evidence the policy of insurance, executed by the defendant, for "*E. P. Cohen*, on account of whom it may concern. Loss payable to him, by which they caused to be insured, at and from the 13th August 1842, at noon, until the 13th August 1843, at noon; if then absent, liberty to renew for three months, at *pro rata* premium, each passage subject to its own average, upon the body, tackle, &c., of the good brig, called the *T. Street*. Beginning the adventure upon the said vessel, &c., at and from, as aforesaid, and so shall continue and endure, until, as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The said vessel, tackle, &c., hereby insured, are valued at the sum insured, $10.000, without any further account to be given by the assured to the assurers, or any of them, for the same, touching the adventures and perils, which the *Mutual Safety Insurance Company* is contented to bear, and take upon itself in this voyage; they are of the seas, men of war, &c.

And it is further agreed, that in case a total loss shall be claimed for, or on account of any damage or charge to the said vessel, the only basis of ascertaining her value, shall be her valuation in this policy."

It was admitted, that at the date of said policy, and thenceforth, and at the time of the loss claimed for in this case, the plaintiff was owner of the vessel mentioned, as insured by said policy. The plaintiff then read in evidence the following depositions:—

Thomas Cromwell deposes, that he was the master of the brig *T. Street*, on her voyage from *New Orleans* to *Kingston*, *Jamaica*; that he left the *Balize*, on the first day of October

1842; they had bad weather from the time the steamboat took them over the bar, and on the 3rd of October it came on so heavy, they had to heave to under a forespencer. About four o'clock, on the 4th of October, the spencer blew away, and they lay under bare poles, and the brig was on her beam ends, and they cut away her mainmast to keep her off before the wind, seeing that she would not right unless her mainmast was cut away. In cutting away her mainmast, it carried away the fore topmast and all the sails and rigging attached to them, and left them no sails at all, except, &c., which were in the cabin. After the gale was over, they got the before mentioned sails up, and steered before the wind, and on Monday week, the 12th of October aforesaid, they struck on *Florida reef*, and let go both anchors, and brought her up, head to the wind. They lay there all night, just clear of the bottom, and the next morning the sea broke all around her, and she began to thump heavy on her bottom, and deponent was afraid she would bilge, and slipped her chains and let her go ashore, and started his mate and two men to *Key West* for assistance, and at ten o'clock that night got assistance, and lightened the brig, by taking flour out of her, and they found three feet of water in her hold. Deponent finally gave her up to the wreckers, and they got her into *Key West*, by keeping both pumps going all the time to keep her free. At *Key West* he called a survey on her, and the surveyors advised her to be sold, and deponent applied to the court for a sale. It was then costing twenty dollars a day to keep her pumped out, to prevent her sinking along side the wharf. The judge of the court ordered her to be sold, and awarded one-half of the proceeds of sale to the salvors. The brig was sold under the order of the court, and the vessel and all her materials sold for about eleven hundred dollars. He brought home about eighteen hundred dollars, on account of the vessel and cargo; how much on account of the vessel, and how much on account of the cargo, he does not know now; he gave the papers to *Mr. Cohen*, the plaintiff.

Cross Examined.—Deponent states that he could do nothing with her, that he was afraid of the lives of the crew, and they slipped the chains to let her go ashore, and sent for the

wreckers. It was twenty miles from the reef to *Key West.* Deponent took the cargo of flour, (not quite all—as much as he could get,) and either the next day or the day after, the wreckers brought her to *Key West;* there were from twenty to thirty wreckers on board of her. Deponent went with the cargo of flour to *Key West,* and the mate and crew went with the vessel to *Key West.* The brig drew about seven feet, without cargo, and ten when loaded with flour. He had two mates and four men before the mast, the cook and himself. The brig was sold by order of the court, and was bought by a gentleman of *Key West,* by the name of *S. Healy.* When deponent left, *Healy* was repairing her, and had put masts in her which he took from another vessel. Deponent knows nothing about her since. Deponent was about twenty days in *Key West.*

The survey set forth, that the surveyors report: "Repaired on board said vessel, and after a careful and impartial survey of her hull, &c., find that she was dismasted in a hurricane on the 4th inst., in which she lost all her spars, except fore-mast, fore-yard and bow-sprit, with the entire rigging and sail, and the hull very much strained throughout, after which she run ashore on the reef, where she lost both anchors and chains, and now leaks so badly as to keep both pumps constantly going. We therefore recommend the master of said vessel, to incur no expense on said vessel, but to sell her immediately for what she will fetch, as her condition is so bad as not to warrant an estimate of repairs."

One of the surveyors, sworn by the plaintiff, on cross-examination deposed, that in the examination, the leak appeared to be in her bottom, occasioned by great straining the brig had had that the leak was not stopped then; that he saw the brig sometime afterwards, hove keel-out at *Green's* wharf, and carpenters endeavoring to heave the after-part of the keel into its place; that he presumes they stopped it then; does not know whether they did or not; that the leak was not ordered to be stopped by the surveyors, nor examination of her bottom had, in consequence of the brig being without spars and rigging sufficient to heave her down, and the expenses of fitting temporary ones

(it not being possible to procure proper spars for the vessel here,) would have been so great, that it was judged for the interest of all concerned, better for the master to abandon her, and sell her; and the surveyors did not believe, that the hull of the vessel was worth the expenses of the outfit it would have required, to render her fit to go to sea, it having been so much damaged and injured in the recent hurricane, and the severe thumping she had had upon the reef.

Another of the plaintiff's witnesses also stated on cross-examination, that he was present at the sale of the brig; thinks there were twenty or thirty persons present; that there were six or seven bidders; *Healy* was purchaser, as he understood from *Healy* himself.

One of the defendant's witnesses deposed, that the vessel could not have been made seaworthy, for the prosecution of her voyage, for four times the amount that it cost *Healy*, as he did not put sufficient repairs upon her, to render her seaworthy.

Another witness for the defendant, deposed, that after she was purchased by *Healy*, he saw the brig hove out; that she appeared much strained; supposes that was the cause of her leaking; afterwards, made a voyage from *Key West* to *New Orleans* in the brig; that she continued to leak badly all the voyage. That the brig was sold, and bought by *Healy*, for himself. That the repairs of the brig here, *Key West*, were merely temporary, everything put upon her was temporary; these repairs cost between two and three thousand dollars, including the first purchase; that she was scarcely seaworthy when she left for *New Orleans*.

There was other proof of a similar character, that she could not have been repaired at a less expense; that she was sold in *New Orleans;* that she took in a cargo for *Havana;* that she then leaked so badly, that an extra number of hands had to be shipped to keep her sufficiently free, to enable her to proceed on her voyage to *Havana;* that when she returned to *New Orleans*, she was taken in the dry dock, and thoroughly repaired and coppered; that those last repairs cost about $4000,

as he was informed by the captain of the brig, who had become a part owner.

The plaintiff then read in evidence the following letters:—

Baltimore, October 28th, 1842.

CHAS. F. SINGLETON, ESQ.,

Agent of the Mutual Safety Ins. Co. of New York.

SIR:—The only information I have relative to the brig *T. Street,* insured with you, is what is contained in a letter published in the newspapers, dated *Key West,* 14th October 1842; from which I infer, that the damage done the vessel, the expenses of getting her off, the salvage to be paid the wreckers, the expenses of repairs, and other expenses at *Key West,* will amount to what may be deemed a total loss of said vessel. In consequence, I hereby abandon to you said vessel, and claim from you a total loss. I am, respectfully, sir,

Your obd't serv't.

Signed, E. P. COHEN.

November 28th, 1842.

E. P. COHEN, ESQ.

DEAR SIR:—I have just received instructions from the *Mutual Safety Insurance Company of New York,* to notify you, that they disclaim all interest in the brig *T. Street,* and deny their liability for any but a partial loss on said vessel, under their policy. This partial loss, when properly proved and adjusted, will be promptly settled. The directors, believing that your title to the vessel has not been divested, and not intending to acquiesce in any but a claim for partial loss, as above stated, have deemed it right to give you this notice, that you may avail of the earliest occasion to reclaim the vessel.

Yours, &c. C. F. S.

The plaintiff then read in evidence, a transcript of admiralty proceedings at *Key West,* upon a libel filed in the district court of the *U. S.*, praying for an allowance of salvage in relation to the said brig.

The district judge decreed, that the marshal advertise, and proceed to sell on the 19th inst., the said brig, she being found unworthy of repairs, and that he also sell so much of the cargo as may be necessary, with the proper proportion of the pro-

ceeds of the sale of the brig to pay the costs and expenses of this suit, the wharfage, storage, and labor in landing said cargo. That the residue of said cargo, the marshal and clerk divide and set off to the libellants, the one moiety thereof in full compensation for their services in saving the same, and that the clerk also pay the one moiety of the proceeds of the sale of the brig, to the libellants, after first deducting its proper proportion of the costs and expenses of saving said brig."

Under this decree, the sales of the brig amounted to $1109.15. Her cargo, in part, $623. Residue, five hundred and seven barrels flour, divided in kind, &c.

The defendant then proved, under a commission to *New Orleans*, that the witness has knowledge of the brig *T. Street*, as she lay in the port of *New Orleans*, on the 5th December 1842, having been on board of her on that day; that she was then in good condition, and deponent thinks sea-worthy. The condition of her hull was good and sea-worthy. Deponent saw the brig in September or August, 1842. The difference in value, on the 5th December 1842, and at the former period, when deponent saw her, deponent thinks was about $1500; that is to say, she was worth less by $1500 on the 5th December 1842, than she was in September or August previous, when deponent saw her. He does not know the name of the owner of the brig, on the 5th December 1842. Thinks her captain's name, in whose charge she was, was *Healy*. The cost of repairs necessary to place her in the condition she was, previously to her disaster, must have been, deponent thinks, about $1500. The repairs which she seemed to have undergone, to enable her to prosecute her voyage from *Key West* to *New Orleans*, to her hull, merely heaving out and caulking, and putting on part of a false keel. Her spars, rigging and sails, had all been changed, part new and part old, except the foremast, bow-sprit, fore-gaft, and fore-rigging. The deponent estimated the value of the brig, as she arrived from *Key West*, at $3500. Her value, he thinks, at *New Orleans*, after all necessary repairs should have been put upon her, would have been $5000; that is to say, if she had been put into as good order or condition, as she was in when deponent saw her, in

September or August 1842. If coppering had been put upon her, she would have increased in value to $6000.

The defendant also proved by another witness, that he saw and examined the *T. Street*, for the first time, on the 9th January 1844; that he estimated the value of the said *T. Street*, on the said 9th January, if all necessary repairs were put upon her, at $5500; as she then was, he regarded her as worth $4000. If copper had been put upon her, the value would be varied, in his estimation, $1000. That he critically examined the said *T. Street*, on the 9th January 1844; that he found her hull in an excellent condition, and with no appearance of having ever suffered any damage; there had been no strain, either inside or outside, upon it; and her ways and fastenings, all appeared as fair as when first put in, and no signs of strains or leak in any part of them appeared. Her bottom, when she was hove out to be coppered, was in good order, and did not show any signs of repairs having been lately made, except putting on it a small piece of the false-keel. Her spars were all new, excepting the foremast, bow-sprit, and fore-gaff. Her rigging was all new, except the lower rigging on the foremast. Her sails were all composed of second-hand sails, that had been used in other vessels, and did not fit the spars to which they were attached.

Other evidence was also offered, of the condition of the brig, and cost of repairs, after the injury at *K. W.*, and, also, at *New Orleans*.

The defendant then prayed the court to instruct the jury :—

That the letter of the plaintiff to the defendant, given in evidence, and purporting to abandon to the defendant the vessel insured, does not operate as an abandonment; and that the plaintiff is entitled to recover only for a partial loss.

That the plaintiff is not entitled to recover for a total loss, unless they shall find, that the vessel by the disasters given in evidence, sustained damage, (including the amount of salvage adjudged and received, to an amount exceeding $5000; and that in estimating said damage, the jury are to take into consideration what was expended for the vessel's repairs at *Key West* after the sale, and what was afterwards expended on her to repair said damages, at *New Orleans*.

That in determining the necessity to sell, they are to have referrence to the circumstances occurring subsequently to the sale of the vessel, in respect of the damage suffered by her, and the extent and cost of repairs actually required, and the actual condition of the vessel at *Key West*, before said sale.

That if they shall find that the master, after the arrival of the vessel at *Key West*, might have communicated by letter with the plaintiff, and through him, with the insurers, and obtained their directions as to the course to be pursued by him with the vessel, without such a delay as would have rendered the destruction, meanwhile, of the vessel probable; or, as would have made a sale of her necessary, to prevent total loss from her actually perishing, or being rendered utterly worthless, then the plaintiff is not entitled to recover, except for a partial loss.

That the necessity that suffices to warrant a sale by the master, must be one which leaves no alternative to a sale, and puts the party in a state of positive compulsion to act.

That according to the true construction of the policy, as given in evidence, the necessity to justify a sale does not arise, unless the damage, (including the amount of salvage adjudged and received,) shall be found by the jury to have exceeded one-half of the value of the said vessel, as stated in the policy; that is to say, that if the jury shall believe from the evidence, that the repairs and expenses of the vessel at *K. W.*, and the necessary repairs at *Key West* to enable her to proceed to *New Orleans*, and the repairs and expenses for repairing her damage thoroughly, added to the salvage aforesaid, did not exceed the said one-half, the plaintiff is not entitled to recover for more than a partial loss.

That in determining upon the point of necessity to sell, the jury are to attach no weight to the recommendation of a sale made by the two surveys, inasmuch as the said surveyors are not on oath,—and show, that there was no thorough examination of the vessel by the surveyors, nor any estimate of requisite repairs, temporary or thorough; and that to ascertain the actual damage suffered by the vessel, and the necessity of the sale, the jury are not only to take into view the circumstances,

as appearing at *Key West*, in reference to the vessel, but also tne fact of the subsequent repairs, and the amount thereof, and the restoration of the vessel, so far as the same are shown in testimony.

The plaintiff prayed the court to instruct the jury, as follows :—

If the jury shall find from the evidence, that the vessel insured was, by one of the perils insured against, so far damaged, that under all the circumstances attending her situation at *Key West*, consequent on said injury, it was necessary, in the opinion of the jury, for the interest of all concerned, that said vessel should be sold; and that under such necessity she was in good faith sold, by order of the court, at the time mentioned in the evidence, then the plaintiff is entitled to recover for a total loss on the policy; although the jury may find, or the court be of opinion, that there was no valid abandonment.

The court, (Le Grand, A. J.,) refused to grant any of the prayers of the defendant, and granted the prayer of the plaintiff, and directed the jury as follows :—

The principles which necessarily arise in this case, are of the first importance to the commercial community; and have been, by the learned counsel, discussed with an ability, which has aided the court much in the formation of the opinions, which it is called upon to announce.

Whatever criticism the case of *Bosley vs. The Chesapeake Insurance Company*, 3 *Gill & Johns.*, 465, may have been subjected to elsewhere, so far as this court is concerned, such strictures can have no influence; for its duty is, to announce the law as it has been decided by the supreme court of the State, leaving to that tribunal the exercise of its peculiar function, of reviewing its own decisions, as well as those of the inferior courts. In that case the Court of appeals said : "Upon principles of reason, justice, and policy, we deem this rule undeniable, that the information which is sufficient to authorise the assured to give notice to the underwriters, that he abandons, must be of such facts and circumstances as would sustain the abandonment, if existing in point of fact, at the time the notice is given." Of what character those facts must be, the court

refer to several authorities to show. Among these, is *Philips on Insurance*. This commentator, at page 448 of his treatise, says: "The underwriters ought to know the grounds of the abandonment, that they may determine whether to accept. Accordingly, the assured must, at the time of making the abandonment, make known to the insurers the reasons for which he abandons. He cannot avail himself of any other ground, than that alleged by him at the time of abandoning; and if there be any other facts, (either known, or not known to him at the time,) on which an abandonment would be necessary, in order to entitle him to recover for a total loss, he must abandon anew, before he can recover for such a loss, on account of those facts." So in *King vs. Delaware Insurance Co.*, 2 *Wash. C. C. Rep.*, 309, where it is said: "The underwriter should have an opportunity of judging, whether he is bound to accept or not. If bound, that he may do so at once, and take proper means for the preservation of the property." The purport of these authorities, in the opinion of the Court of Appeals, is, obviously, that an abandonment, to be sufficient, must disclose to the underwriter such facts and circumstances, as would furnish him an opportunity to decide, whether or not he will accept.

In the case, *Bosley vs. Ches. In. Co.*, in which these authorities are referred to, and adopted, the insured, by letter, communicated the intelligence to the company, that he had observed by a *Boston* newspaper of the 29th January, that the ship *Gen. Smith*, insured in their office, was driven ashore in a heavy gale of wind the 6th December; and by a *Charleston* paper, of the 26th January, that on the 13th, she was got off. that in so dangerous a situation as *Helvoct Roads*, it was to be feared that a total loss had ensued, and he, therefore, abandoned her. The court, when considering this letter, inquired, whether "the facts disclosed in the notice shew a total loss, either actual or technical;" for said they, "unless they do, the abandonment is wholly defective." "If," (say the court, in the prosecution of this inquiry,) "mere stranding be not a total loss, there is no total loss disclosed by the notice. The only facts upon which such conclusion could rest, are, that in a gale

of wind the ship was driven on shore, and had remained there seven days. But, whether she remained there from choice, to make some inconsiderable repair, as for example, to re-ship her rudder, or from necessity; whether she was thrown one foot, or one mile from the channel of the river; whether she laid high and dry, or in ten feet water; whether she had sustained any damage by the accident; whether any effort had been made to get her afloat; or whether the accomplishment of that object was impracticable, or could be accomplished by the expenditure of ten dollars, or ten thousand dollars; were matters on which the insurers were left to speculate in utter darkness." The abandonment was held insufficient. Wherein the intelligence communicated by the plaintiff to the defendants, was more full than that communicated by *Bosley*, I am unable to discover. It informs the company of the following facts:—That, from a letter published in the newspapers, dated *Key West*, 14th October 1842, he inferred, the damage done the vessel, the expense of getting her off, the salvage to be paid the wreckers, the expenses of repairs, and other expenses, at *Key West*, would amount to what might be deemed a total loss of said vessel. What information the letter of 14th October contained, is unknown; it not having been offered in evidence. If this letter of the 28th October 1842, be subjected to the same kind of examination as was that of *Bosley's*, there certainly ought to be no difficulty in determining, that it is equally insufficient; and if this case was, in my estimation, similar in all its circumstances to that case, there would be an end, in my judgment, to the question of total loss. But according to my apprehension, there is a marked distinction between them.

The proposition of the plaintiff, contained in his first prayer, is intended to raise the question, how far any act of the master of the vessel, and the circumstances attending that act, can operate to make a total loss. In other words, if the jury shall believe the master acted in good faith for all parties concerned; and shall further believe from the evidence, that at the time of the sale, such sale was a matter of necessity, whether such act of the master and such sale, make the loss a total loss?

The same prayer of the plaintiff presents also the additional question, whether, upon the jury finding the facts just mentioned, in such a case, the plaintiff was under any obligation to abandon at all to entitle him to recover for a total loss?

In the case of the brig *Sarah Ann, Woodbury and others, claimants, 2nd Summer's Reports,* 215, *Judge Story* said: "It has been suggested, that as the stranding was on a home shore, at no great distance from the residence of the agent of the owners, the master was not authorised to sell without consulting the agent or the owners. I agree at once to the position, if there is no urgent necessity for sale. But if such an urgent necessity does exist, as renders delay highly perilous, or ruinous to the interests of all concerned, the duty of the master is the same, whether the vessel be stranded on the home shore, or on foreign shore; whether the owner's residence be near, or be at a distance. I am aware of the doctrine maintained by my brother, the late *Mr. Justice Washington* in *Scull vs. Briddle,* 2 *Wash. Cir. C. R.* 150, and unless it is to be received with the qualification above stated, I cannot assent to it. The fact that the brig was actually gotten off by the purchaser after sale, is certainly a strong circumstance against the necessity of the sale. But it is by no means decisive; for we are not, in cases of this sort, to judge by the event; for a vessel may be apparently in a desperate situation, and yet by some luck, accident, or unexpected occurrence or fortunate circumstances, she may be delivered from her peril. We must look to the state of things, as it was at the time of the sale, and weigh all the circumstances: the position and exposure of the brig; the season of the year; the dangers from storms; the expense of any attempt to get her off; the probable chances of success; and the necessity of immediate action on the part of the master, one way or the other."

In the case of *Catlett and Keith vs. The Pacific Ins. Co. of New York,* 1 *Wendel,* 561, it was held, that a report by the surveyors of a port, into which a vessel put in, in distress, that the repairs of a vessel insured cost $20,000, when the vessel itself was valued at $10,000; and proof, that upon such report, and at the request of the master, the vessel was sold by order

of a court of vice-admiralty, is sufficient evidence of a technical total loss, especially where the underwriters put their refusal to pay upon other grounds.

In the case of *Cambridge vs. Anderton*, 9 *Eng. Com. Law Rep.*, 224, the facts were these: *assumpsit* was brought on a policy of insurance on the ship *Commerce*, from *Quebec* to *Bristol*. It appears that the ship, with a cargo on board, sailed from *Quebec*, and about two hundred miles below *Quebec*, got upon rocks, in the river *St. Lawrence*, in foggy and tempestuous weather. She was much injured, and surveyed by experienced persons, who gave it as their opinion, that the expenses of getting her off the place where she was lying, if it could be accomplished, and repairing her, would far exceed the value of her when repaired; under these circumstances, the captain and agent for the plaintiff, sold the ship, with her certificate of registry. The purchaser did succeed in getting her off the rocks, took her back to *Quebec*, and repaired her; she afterwards sailed on a voyage to *England*. The Lord Chief Justice told the jury, that if, under the circumstances in evidence, they thought that the ship was not repairable at all, or that when repaired, she would not be worth the expense of doing the repairs, the plaintiff was entitled to recover for a total loss; but if otherwise, they could claim for an average loss only. The jury found a verdict for a total loss, and a new trial was moved for. *Abbott, Chief Judge*, said: "whether the ship was repairable or not, was left to the jury, and I think they disposed of it correctly. If the subject matter of insurance remained a ship, it was not a total loss, but if it were reduced to a mere congeries of planks, the vessel was a mere wreck; the name which you may think fit to apply to it, cannot alter the reason of the thing." And *Bayley, Judge*, said: "I take the legal principle to be this, if by means of any of the perils insured against, the ship ceases to retain that character, and becomes a wreck, that is, a total loss, the master may sell, and the assured may recover for a total loss, without giving any notice of abandoment." And *Holroyd, Judge*, said: "when the damage sustained makes a total loss, it is unnecessary to give notice of abandonment.

The Supreme Court of the *United States*, in the case of the *Patapsco Insurance Co. vs. Southgate, et al.*, 5 *Peters*, 621, observes, that "as a general proposition, there can be no doubt, that the injury may be so great, and the necessity so urgent, as to justify a sale. There must be this implied authority in the master, from the nature of the case. He, from necessity, becomes the agent of both parties; and is bound, in good faith, to act for the benefit of all concerned, and the underwriter must answer for the consequences, because it is within his contract of indemnity." The court, however, do not decide, whether in such a case, to enable the insured to recover for a total loss, it is necessary that he should abandon; but at page 623 of the same report, they intimate strongly, that such is the law. Their language is: "It may not be amiss to observe, that there is very respectable authority, and that too, founded upon pretty substantial reasons, for saying, that no abandonment is necessary where the property has been legally transferred by a necessary and justifiable sale." In sustentation of this intimation, they refer to 2 *Pickering*, 249. In this case, *Gordon vs. Massachusetts Fire and Marine Insurance Company*, the whole subject is fully reviewed and discussed with eminent ability and clearness. It is not deemed necessary to refer to many cases cited in that opinion. The conclusion at which the court arrived, seems to me that which is only deducible from all of them. *Parker, Chief Judge*, in delivering the opinion of the court, in this case, said: "I think, when a vessel has been so far injured by a peril of the sea, as to make a survey necessary, and the master, with perfect good faith, calls such survey, and the persons appointed to take it, are competent in point of skill, and wholly disinterested, and they, after a full and sufficient examination of the vessel, find her essentially injured, and come to a fair conclusion, that from the high price of materials and labor, or the difficulty of procuring them, the expense of repairing will be more than the worth of the vessel after she is repaired, and therefore they advise, for the interest of all concerned, that the vessel be sold; in such a state of things as this, it seems to me that a moral necessity is imposed upon the captain, to act according to their advice. It must be considered,

that thus situated, he becomes, by law, an agent for the insurers as well as the insured; and is equally bound to look to the interest of both. Shall he, in defiance of such an opinion, proceed to repair the vessel, with the certainty of adding to the misfortune which has already befallen either the owner or the insurer? Or shall he leave the vessel, without selling or repairing, until he shall return home and communicate her situation to those concerned, that they may act for themselves in relation to her? I think neither of these things would be expected of him, and that such a course would be exceedingly prejudicial to commerce? The only alternative left for him, is to pursue the advice of that body of men, who, by the usage of trade, have been immemorially resorted to on such occasions. If they acted fairly, and the captain acted fairly, his acts in conformity with their opinions, will be justified; unless it shall be made to appear, by those who contest the loss, that the facts on which they founded their opinions, were untrue, or the inferences which they drew from those facts, were incorrect. And the burden of proof should be upon those who would impeach the proceedings. If they should be successfully impeached, I think the sale of a vessel, founded upon them, cannot be set up as a ground for a claim of total loss, against the underwriters." "In such a case," says the court, "if the jury were satisfied from all the evidence, giving due weight to the opinions of the surveyors, that the sale was necessary, then the sale constituted a total loss; and we think, that an offer to abandon, would not have been necessary; but the fact, itself, of a sale, would constitute a total loss." All of these cases decide, clearly, the point, that if there be an urgent necessity for it, the master, as agent of both the insured and underwriters, has a right to sell the vessel, and that such sale constitutes a total loss, for which the underwriters are responsible; and the one in 9 *Eng. C. L. Rep.*, 224, and the one in 2 *Pickering*, 249, also establish the principle, that in such a case it is not incumbent upon the insured to abandon at all.

The same doctrine is maintained in a great number of other cases, both *English* and *American*, the most prominent of which are referred to in 2 *Pickering*, 249, and in case of *Roux*

vs. Salvador, 32 *Eng. Com. Law*, 110. The principle seems to be this: that where the insured has property which he can transfer, he is bound to abandon; but when he has been divested of his title by a sale, which is warranted by the rules of law, there is nothing to abandon, and he is not compelled to perform a useless and unmeaning ceremony. From what has been said, it is obvious, that, in my opinion, if the captain himself had, at private sale, sold the brig *T. Street*, and the jury should believe, from all the circumstances, that such sale was made under an urgent and absolute necessity, there was no obligation on the part of the plaintiff to make an abandonment. This being the case, it is deemed a matter of no importance, whether the sale was made by the captain, or in pursuance of the decree of a court of competent jurisdiction, for on the concurrence of the circumstances which I have stated, the loss is a total loss. This capacity of the captain to sell, is one, however, which only attaches in cases of extreme, urgent, and absolute necessity. His fears are not to be the standard by which the existence of any such necessity is to be determined; nor are the improper interferences of those with whom he consults, to determine the fact. It is for the jury to ascertain, from all the circumstances attending the case at the time of sale, whether there existed such a necessity for the sale, for the benefit of all parties concerned, as ought to have induced the captain to have effected it.

In the case of *Bryant et al., vs. Commonwealth Ins. Co.*, 13 *Pick.*, 543, this question of necessity is fully examined. The court there say: "He, (the captain,) might be justified, if the necessity were so urgent as to require immediate action; as, if the goods would probably perish or be destroyed, before the directions of the owners could be obtained. But, if the goods were not perishable, or damaged, and might be preserved in reasonable safety, until the owners could be consulted, he should preserve and guard them; and in such case, he would have no more authority to break up the voyage, and sell the cargo, than the mate or a stranger would have. And, notwithstanding, he conducted himself honestly, yet, if the other elements, which make up this legal necessity, were wanting, the owners and underwriters would not be bound."

In the case of *Hall vs. Franklin Ins. Co.*, 9 *Pick.*, 478, it was held, that the necessity which will justify the master of a ship in selling her, is one in which he has no opportunity to consult the owners or insurers, which leaves no alternative. "There must be," say the court, "something more than expediency in the case; the sale should be indispensably requisite. The reason for it should be cogent. We mean a necessity which leaves no alternative; which prescribes the law for itself, and puts the party in a positive state of compulsion to act." Whether the sale in this case, was made to satisfy the claim of the salvors, and at their instance, or at the instance of the captain, I do not deem it important to decide; for whether the one or the other, I take it, its influence here would be the same. Whilst the third proposition of the defendant, that the decree should have no weight with the jury, must be rejected, nevertheless, that contained in the second prayer of the plaintiff, cannot receive my assent. To sustain the third proposition of the defendant's counsel, the case of *Parrling vs. Ex'rs of Bird*, 13 *John.*, 192; and the case of *Baldwin and Worthington vs. Hale*, 17 *John.*, 272, have been referred to. According to my apprehension, neither of the cases have any thing to do with the question. In the first mentioned case, *Pratt, Judge*, said: "It is well settled, that a judgment in another State, (one of the *U. S.*,) is to be considered here as a foreign judgment in every respect, except in the mode of proving it, which is regulated by a statute of the *United States*. It is only *prima facie* evidence of a debt, and may be impeached, when attempted to be enforced, as unjust, or unfair, or irregular." In the other, 17 *John.*, 271, it was held, that a replication of *nul tiel* record to a plea of judgment, recovered for the same cause of action in the circuit court of the *U. S.*, must conclude to the country, and not with a verification. This decision was founded upon the idea, that as the State court of *New York* had not the power to compel the transmission of the record from the circuit court of the *United States*, the replication ought to conclude to the country, for that was the only way in which its verity could be tested. Both of these decisions proceed upon the idea, that the courts of the several States, to those of the other States,

must be viewed as foreign courts. It is not necessary for me to controvert this opinion, although it might be done on the authority of a number of cases. A different doctrine was held in 9 *Mars.*, 464, 465. 7 *Cranch*, 485. 1 *Peter's Rep.*, 78. *Hardin's Rep.*, 413. And in *Wheaton.* But, if we were to admit the truth of the doctrine in *Johnson's Reports*, still they can have no bearing upon this case; for in those cases, it was sought to enforce judgments obtained in other States, and it is only in such cases, the merits of a foreign judgment can be examined, 3 *John. Rep.*, 169. Here, there is no such attempt made. The matter to be enquired of, is simply, whether there was a sale, either at the instance of the salvors, or at the instance of the captain; and if so, was it made under such circumstances as were warranted by the law, and determine the responsibility of the defendants. Assimilating, then, this decree, of one of the federal courts, to one of a State court, and give to the cases in *Johnson* their full force, how does the matter stand? Simply this, the decree may be impeached, if the sale ordered was not justifiable. I mean, if it was not made on such grounds as would fix the liability of the underwriters. For, although the sale and delivery of the property, in pursuance of such decree, might vest in the purchaser a good title, yet, this circumstance alone, would not ascertain the liability of the defendants for a total loss. Their liability does not depend upon the decree, or upon the sale *per se*, but upon the justifiableness of the sale; upon the necessity there was for it. Entertaining these views, all the propositions of the defendant must be overruled, and, also, the second prayer of the plaintiff. Believing there is testimony to go to the jury, from which they may infer the existence of a necessity for the sale, the first proposition of the plaintiff is granted.

To the refusal of the defendant's prayers, and granting of the plaintiff's, and to the direction and opinion aforesaid, of the court, the defendant excepted, and prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By DAVID STEWART and MAYER for the appellants, and
By GLENN and MCMAHON for the appellees.

MAGRUDER, J., delivered the opinion of this court.

This suit was brought in *Baltimore* county court, by the defendant in this court, on a policy of insurance; the vessel insured being, by some of the disasters insured against, much damaged.

The policy on which the suit was instituted, bears date 13th August 1842, and was effected on the brig, *T. Street*, valued in the policy at $10,000. On her voyage, she encountered a gale, which did her very much damage. While making her way to a port of safety, she was grounded on a reef about twenty miles from *Key West*, at which place she arrived, 14th August 1842, laden with about twelve hundred barrels of flour. Surveyors, appointed for the purpose, reported, that the condition of the vessel did not justify her being repaired, and they recommended that a sale of her should immediately be made; or, that the expense of keeping her afloat should be avoided, by allowing her to sink, until a sale should be made.

There is much other proof with respect to the damage done to the vessel, the hopelessness of her condition, and the unavoidable expense of any delay in making sale of her.

Immediately after her arrival at *Key West*, the salvors filed their libel, in which they claimed salvage for the vessel and cargo. The court decreed a sale, allowing to the salvors one half of the amount of sales, after deducting all expenses. A few days thereafter, the brig was sold for $1010.

On the 24th October, the plaintiff in the court below, addressed a letter to the defendant, giving "the only information" he had, relative to the brig, *T. Street*, and claiming a total loss. An answer to that letter, bearing date 28th of November, "disclaimed all interest in the brig, *T. Street*, and denied their liability for any but a partial loss for the said vessel, under their policy."

The claim, then, of the plaintiff in the court below, was for a total loss; while his adversary insisted, that a recovery could only be had for a partial loss. The verdict was for the plain-

tiff, and the case comes here upon several exceptions, taken by the defendant there.

In opposition to this claim, it was insisted, in the first place, that there is no proof in the record of a valid abandonment of this vessel. Of this opinion was the court below, and indeed, the plaintiff did not insist upon it, or seem to have supposed, that the letter written by him to the underwriter, would have entitled him to claim, as for a total loss; and accordingly he maintained, that in a case like this, the underwriter is under no obligation to abandon at all, in order to recover for a total loss.

The ground on which the claim was rested, was, that a sale of the vessel was necessary, and that it was for the interest of all concerned, that the vessel should be sold; and under such necessity she was, in good faith, sold at the time mentioned in the evidence. Of all this the jury were to judge, and by their verdict have established, the necessity for the sale; that it was for the interest of all concerned; and under such necessity, she was, in good faith sold, at the time and in the manner stated. All of this is conclusively established by the verdict of the jury, unless, indeed, the jury was misled by some erroneous instruction which they received from the court, or in consequence of a refusal by the court to give an instruction which was asked, and ought to have been granted. If the court was correct in the opinions which it expressed, and especially in the opinion, that there was no valid abandonment, it seems to be quite unnecessary to enquire, what proof would have been necessary in order to make out the case, if the plaintiff below, to make out his case, had been obliged to prove a valid abandonment, or an acceptance of the abandonment.

It is insisted, that the necessity which is to justify the sale of the ship by the master, must be one which leaves him no opportunity of consulting the owner, or underwriter, and that the master can only act for them, when they have no opportunity of acting for themselves. We do not discover, that the learned judge who instructed the jury, thought otherwise. In his instruction he says: "If there be an urgent necessity for it, the master as agent, both of the insured and underwriter, has a

right to sell the vessel; and such sale constitutes a total loss, for which the underwriters are responsible.—If the jury should believe, from all the circumstances, that such sale was made under an urgent and absolute necessity, there was no obligation on the part of the plaintiff to make the abandonment." Again, using the language of *Justice Story*, (2 *Sumner*, 215,) when answering a remark, that "as the stranding was on a home shore, at no great distance from the residence of the agents of the owners, the master was not authorised to sell, without consulting the agent of the owners," he said: "I agree at once to the position—if there be no urgent necessity for a sale. But if such urgent necessity does exist, as renders delay highly perilous, or ruinous to the interests of all concerned, the duty of the master is the same, whether the vessel be stranded on the home shore, or on foreign shore; whether the owner's residence be near, or at a distance." And after this, adopting also the language of another, he states: "The necessity which will justify the master of a ship in selling her, is one in which he has no opportunity of consulting the owners, or insurers—which leaves no alternative. The sale should be indispensably requisite." Surely in these passages, to be found in the opinion of the court below, (and others might be added to them, if more were requisite,) the jury received from the judge, all the instruction which, as yet, our courts have deemed to be requisite.

It is insisted, however, that "the necessity should be" defined "to the jury, and that" a standard be "furnished, by which the question of adequate necessity is to be tested;" and in order to supply this "standard," and to justify the exercise of what is called "the master's" "extreme authority," it is said, that the language to be used by the judge, must be like this:—"The necessity must be urgent and stringent"—"a necessity which leaves no alternative, and puts the party in a positive state of compulsion to act."

We do not mean to say, that such language, in such a case, is inadmissible; we merely deny that it is necessary to introduce those phrases into a judge's instruction. It may be added, that these phrases insisted upon, do not furnish to the minds

of the jury, any better "standard," than the language used by the court below, whereby to enable them to judge, whether "an adequate necessity" existed, for a sale.

In the case of the *Patapsco Insurance Company, against Southgate and others*, 5 *Peters*, 619, the Supreme Court of the *United States* affirmed the judgment of the court below, in which, among others, was this instruction given to the jury :— "If they should be of opinion that it was not such a case of urgent necessity as to justify the sale, then the plaintiffs are not entitled to recover for a total loss." In the same opinion, the court seemed to suppose, that the difficulty in such cases is imposed upon the jury, rather than the court. "The difficulty," said *Judge Thompson*, "in all these cases, consists, principally, in the application of a rule, to a given case, than in determining what the rule is."

This court, too, in the case of *Cohen against the Neptune Insurance Company*, discovered no error in the instruction, in effect, that if it was necessary, in the opinion of the jury, for the interests of all concerned, that said vessel should be sold, and that under such necessity, she was in good faith sold, then the plaintiff is entitled to recover on the policy, though no valid abandonment was made.

We conclude then, that the court below did not err in granting the instruction asked by the plaintiff there; that there was evidence, from which the jury might infer a necessity to sell; and that the instruction given to the jury, was quite sufficient to enable them to apply the rule of law to the circumstances of the case.

We thus dispose of the important questions raised in the court below. There was, it is true, some other exceptions; but in these we find nothing which will warrant a reversal of the judgment. In this case it was preferred, to submit at once a variety of prayers, and that the court should, in one charge, embody so much of them as the judge thought to be correct. It is no wonder, that among them are to be found prayers, which would demand our attention, if others had been disposed of, otherwise than they were. We discover nothing that was said, or omitted to be said by the judge, whereby the defend-

ant in the court below, was aggrieved; though something to be found in those prayers might have been proper, if there had been a valid abandonment; and upon this ground alone, the plaintiff in the court below, had claimed as for a total loss.

Some of the instructions which were asked for, and refused, might have been granted; but it is believed, that the instruction given covers the whole ground, and therefore, for the rejection of them, the judgment ought not to be reversed. For this there are precedents, one of which may be found in *Stokes against Saltonsal*, 13 *Peters*, 191.

JUDGMENT AFFIRMED.

PAMELA A. DENT, ADMINISTRATRIX OF LEVI DENT, *vs.* PRISCILLA DENT.—*June* 1846.

It is a general rule of evidence, that the acts and admissions of a party on the record, are evidence, although he be but trustee for another; but this rule is not without exceptions.

In an action against an administratrix, her admissions made before letters of administration had been granted to her, are not competent to charge her intestate's estate. They were destitute of an essential requisite, viz., interest in the subject matter to which they related, at the time they were made.

APPEAL from *Charles* county court.

This was an action of *assumpsit*, brought by the appellee against the appellant, on the 26th January 1843. The defendant pleaded *non assumpsit* by her intestate, nor by her since his death, and *actio non accrevit, &c.*, on which issues were joined.

EXCEPTION. At the trial of this cause the plaintiff proved, by *Eliza Dent*, a competent witness, that she was present, in September 1840, at plaintiff's house, and heard defendant's intestate borrow from plaintiff the sum of $701.20; which was then paid to him.

The defendant then proved by *Miss Smoot*, a competent witness, that she was present when said intestate came to

plaintiff's house, in the fall of 1840, and asked plaintiff, who was his mother, for money; that she then gave to him the sum of $700, or upwards, saying, that she "was not like some persons, who gave and took back." And afterwards told said witness, that she had presented that money to her said son. Said witness further stated, that the witness, *Eliza Dent*, was not then present.

The defendant further proved by —— *Carrico*, a competent witness, that after the death of said *Levi*, he went with plaintiff to see defendant, and that defendant in his presence, told plaintiff, that if she had any account against said *Levi*, it was false; as he did not owe a cent in the world.

The defendant then further proved by competent witnesses, that on the night when said *Levi* died, and on the next day, the plaintiff said, that he did not owe a dollar in the world.

The plaintiff then offered to prove by *Dr. Johns*, a competent witness, that after said *Levi's* death, but before defendant had administered on his estate, the defendant on a different occasion from any referred to in the previous testimony, complained, that on the night of the death of said *Levi*, and before his death, although the plaintiff had said, that said *Levi Dent* did not owe a debt in the world, yet she, the said plaintiff, said to her, that said *Levi* owed her a sum of money, but owed no one else. And that immediately after his death, plaintiff had said to defendant: "Mind, there is money in the house, and you must keep it to pay me;" or words to that effect.

The defendant objected to the admissibility of said evidence, so offered by *Dr. Johns*, on the ground, that said declarations were made by defendant before she had administered on the estate of said *Levi*, but the court, (C. Dorsey, A. J.,) admitted the same as evidence to the jury; the defendant excepted, and prosecuted this appeal.

The cause was argued before Archer, C. J., Dorsey, Chambers, Spence, Magruder and Martin, J.

By Horsey and Crain for the appellant.

No counsel for the appellee.

SPENCE, J., delivered the opinion of this court.

It is a general rule of evidence, that the acts and admissions of a party on the record, are evidence, although he be but a trustee for another. *Mr. Starkie*, in his work on evidence, *volume* 2, *page* 22, says: "Such admissions are always evidence." We think this language lays down the rule too broadly; it, in fact, makes the rule a universal one, and without an exception.

That the admissions and declarations made by one, in relation to a subject matter in which the party making such admissions or declarations, has an interest at the time they are made, are evidence, is settled law; for it finds application in almost every trial in the county courts by a jury.

The exception in this case, states, that the declarations of the defendant, given in evidence in this cause, (to which the defendant excepted,) were made by her before letters of administration were granted to her. They were not only destitute of the essential requisite, to wit, interest in the subject matter to which they related at the time they were made; but they were to affect the legal rights of others, namely, creditors and distributees. It was decided in *Pocock vs. Billing*, 2 *Bing.*, 269, that the declarations of one who has been the holder of a bill of exchange, cannot be received in evidence, unless they were made while the party had the possession of the bill.

The case of *Plant vs. McEwen*, 4 *Conn. R.*, 544, entirely covers this case, and we assent to the law therein laid down. In that case, a suit was brought against an executor on his probate bond, it was held, that his declarations and acts, made and performed before he was executor, were inadmissible against him, as the judgment would affect heirs and creditors; in relation to whom the executor was a stranger.

JUDGMENT REVERSED AND PROCEDENDO ORDERED.

Peter and Samuel Dickinson *vs.* William Barnes.—*June* 1846.

It is no reason for quashing an attachment, that the affidavit of the creditor was made before a justice of the peace of one county, while the warrant to the clerk of the county court, to issue the attachment, was granted by a justice of his county.

The justice of the peace, who issues the warrant, must be of the county in which the attachment is to be issued.

Upon a motion in arrest of judgment, the appellant may assign other errors than those which are to be found in the record. So upon a motion to quash an attachment.

To procure an attachment against an absconding debtor, the affidavit of the creditor should allege, that the debtor was a citizen of this State.

Appeal from *Carroll* county court.

On the 4th November 1843, the appellants, in order to procure an attachment against the appellee, filed in the said county court, the following affidavit:—

"State of Maryland, *City of Baltimore, to wit:*

Be it remembered, that on the 4th November 1843, before me, the subscriber, a justice of the peace of the State of *Maryland*, in and for the city of *Baltimore* aforesaid, personally appeared *Peter Dickinson*, one of the firm of *Dickinson & Brother:* which firm is composed of *Peter Dickinson* and *Samuel Dickinson*, both residents of the *United States*, and made oath on the holy evangely of Almighty God, that a certain *William Barnes*, late of the city of *Baltimore*, is justly and *bona fide* indebted unto the said *Peter Dickinson*, jointly with *Samuel Dickinson*, partners doing business together, under the firm of *Dickinson & Brother*, in the just and full sum of $844.50, over and above all discounts. And at the same time, the said *Peter Dickinson* produced to me the promissory notes and open account, on and by which the said *William Barnes* is so indebted; which is hereto annexed. And the said *Peter Dickinson* did also make oath, that he is credibly informed and verily believes, that the said *William Barnes* has actually run away and fled from justice; and removed from his place of abode with intent to injure and defraud his creditors.

John W. Peale,

Justice of the Peace of the State of *Maryland*, in and for the city of *Baltimore*."

It was accompanied with certain promissory notes of the said *William Barnes*, endorsed to the appellants, and an open account againt him. To the affidavit was annexed the usual certificate of the clerk of *Baltimore* county court, as to the officer, *J. W. Peale*, the justice.

A warrant from a justice of the peace of *Carroll* county, directed to the clerk of that county court, was also annexed to the affidavit, notes and account, directing an attachment to be issued, &c. The process issued, and was returned, laid on the goods and chattels, rights and credits, &c., in the hands of *Jacob Meyerly and others*.

The garnishees not appearing at the return term, the appellants moved for a judgment of condemnation, which the county court refused to render.

At the next term, the defendant, *Barnes*, appeared, and moved the court to quash the attachment, for the following reasons:

1st. That the affidavit on which said attachment is issued, is not taken before a justice of the peace, as is required by the act of Assembly, in such case made and provided.

2nd. That the warrant to the clerk to issue said attachment, is not signed by the same justice of the peace before whom said affidavit was made.

3rd. That said attachment, and the proceedings therein, are, in many other respects, informal and insufficient.

The county court quashed the attachment, with costs; and the plaintiffs appealed to this court.

The cause was argued before Archer, C. J., Dorsey, Chambers, Spence, Magruder and Martin, J.

By J. H. B. Latrobe for the appellants.

This case presents a question of considerable interest, which is of almost daily occurrence in the State, and which it is important to have settled.

The plaintiffs residing in *Baltimore*, being creditors of the defendant, an absconding debtor, sent their account, with the affidavit required by the act of 1795, made before a justice of the peace of the city of *Baltimore* to *Westminster*, the late

domicil of the defendant, where application was made to a justice of the peace of *Carroll* county, for an attachment against the goods, &c., of the defendant. The attachment was issued, and returned levied as per schedule.

The defendant then, by his counsel, moved to quash the attachment on the following grounds:

1st. That the affidavit on which said attachment was issued is not taken before a justice of the peace, as is required in the act of Assembly in such cases made and provided.

2d. That the warrant to the clerk to issue said attachment, is not signed by the same justice of the peace, before whom said affidavit was made.

3d. That said attachment, and the proceedings therein, are in many other respects informal and insufficient.

The court having granted the motion to quash, the present appeal was taken.

The true question in the case is, whether the justice issuing the warrant, must be the justice before whom the affidavit is made?

Here the affidavit was made by the creditor residing in *Baltimore*, before a justice of that city, and the warrant was issued thereupon by a justice of *Carroll* county, that county being the late domicil of the defendant.

The appellants' counsel insist, that this was the proper course to be pursued, and rely on the language of the act of Assembly.

The appellee's counsel insists, on the other hand, that the affidavit should have been made before the same person by whom the warrant was issued: and that this not having been done, the attachment was properly quashed; and the appellee's counsel also relies on the act of Assembly to sustain his view.

The whole question, then, arises on the proper construction of the act.

The act, section 1, declares, that "the creditor may make application to any judge of the general court, justice of the county court, or justice of the peace; and on oath or affirmation of such creditor made before any judge of the general court, justice of the county court, or justice of the peace of

this State, or before any judge of any other of the *United States*," (of the facts enumerated in this part of the section,) the said judge of the general court, justice of the county court, or justice of the peace, may issue his warrant, &c.

Now the real question is, to what do the words of reference, "the said," refer? Do they refer to the judge, to whom the application was made, or the judge, &c., before whom the affidavit was made? The appellants contend that they refer to the former. This it is thought, can easily be made plain.

Suppose that an account, proved before a judge of *Louisiana*, was presented to a justice of *Carroll* county, and application made to him for a warrant for attachment thereon, could there be any question about his obligation to grant the warrant? Certainly not: because an affidavit before any judge of any other of the *United States*, is made sufficient by the express terms of the act. Applied to such a case, the act would be read, "the creditor may make application to a justice of the peace, and on oath or affirmation of such creditor, made before any judge of any other of the *United States*, the said justice of the peace may issue a warrant, &c." There can be no doubt about this.

We see then, that the act does not provide, in the case of a foreign creditor, that he shall come to *Maryland*, and make oath of his claim before the justice to whom he applies for a warrant on attachment. He may make his affidavit before a judge, in his own State, and send it to *Maryland*. Why then should a creditor residing in *Baltimore* county, not be permitted to make his affidavit before a justice in *Baltimore* county, and send it to the *Carroll* county justice, as the foundation for the warrant? Why should the foreign creditor have more favor than the domestic? Why should the foreign judge have more authenticity than the domestic? Why should a creditor living in *York*, *Pennsylvania*, be authorized to send an affidavit across the line to a justice of *Harford* county, and obtain a warrant for attachment, while a creditor in *Dorchester* county must, in person, go to *Harford* county to make affidavit of the truth of his account before the *Harford* justice? No reason whatever can be given for these distinctions: and yet,

if the appellee is right, they exist in the law. But they do not exist in terms. They are the result of a construction, which we contend is erroneous. The error consists in making the words of reference, "the said," already mentioned, refer to the justice before whom the affidavit is made, instead of the justice to whom the application is made. In the act there is nothing to shew, that these are the same persons. The usual words of reference are not to be found. The language used is not, "and on oath, &c., before the said or the same judge," &c., but, "and on oath, &c., before any judge," &c.

The section is made to appear involved, by the insertion of a description of the oath, which separates, *longo intervallo*, the relative from the antecedent. A careful reading of it, however, will shew, that the construction contended for by the appellants is the only one that can be properly given to it: and that it is not at all necessary that the affidavit should be made before the same justice, who is applied to for the warrant for the attachment.

The third ground for the motion to quash, taken by the appellee in the court below, is too vague for consideration here. Only those questions made below, and inserted in the record, are proper for the consideration of this court.

In the argument of the appellee's counsel, an objection is taken to the proceedings below, and it is alleged, that they are defective, because the averment, that *William Barnes*, late of the city of *Baltimore*, is justly, &c., indebted, is not a sufficient averment that he is a citizen of *Maryland*, as required by the act of Assembly. Now, although this is a question not properly before the court, yet it may be stated, that the necessity of such averment was expressly done away with by the act of 1825, chap. 114, sect. 1.

For these reasons the counsels of the appellants insist, that the decision of the court below should be reversed.

By W. P. Maulsby for the appellee.

In this case, the affidavit of the creditors was made before a justice of the peace of the city of *Baltimore*, and transmitted to a justice in *Carroll* county, who issued his warrant to the

clerk of *Carroll* county court, directing him to issue the attachment. The affidavit was made before one justice of the peace, and the warrant to the clerk, was issued by another. The act of 1795, chap. 56, sec. 1, provides, that on the oath or affirmation of a creditor, made before any judge of the general court, justice of the county court, or justice of the peace of this State, that the debtor is indebted, &c., the said justice of the general court, justice of the county court, or justice of the peace, shall be authorised to issue his warrant to the clerk of the general or county court, directing him to issue the attachment. The language of the act is imperative. The same justice before whom the affidavit is made, and no other, is authorised to issue his warrant. Whatever the practice may have been, or whatever inconvenience may result from the necessity of an observance of the terms of the act of Assembly, those terms are so unequivocal; the language of the act is so clear and positive, that it cannot, I submit, be forced to yield, either to practice or convenience. The oath or affirmation may be made before any judge or justice of the peace, and the said judge or justice of the peace, is authorised to issue his warrant to the clerk. In this case, the affidavit was made before *Mr. Peale*, a justice of the peace of the city of *Baltimore;* and the warrant to the clerk of *Carroll* county court, was issued by *Mr. Gore*, a justice of the peace for *Carroll* county. The act of 1795, is of that class of statutes which are to be strictly construed.

The affidavit of the creditor in this case, made before a justice of the peace in the city of *Baltimore*, omits wholly the statement or allegation, that *Barnes*, the defendant, is a citizen of the State of *Maryland;* no such averment, that the defendant is a resident of the State, is made in any of the proceedings preparatory to issuing the attachment. The averment in the affidavit, that *William Barnes*, late of the city of *Baltimore*, is justly and *bona fide* indebted, &c., is not a sufficient averment, that the said *Barnes* is a citizen of the State of *Maryland*, to satisfy the requirement of the act of *Assembly*. For this cause, the attachment was properly quashed by the county court.

The warrant issued by *Mr. Gore*, the justice of the peace for *Carroll* county, to the clerk, directing the issuing of the attachment, does not contain a sufficiently distinct recital of the oath on which he granted the warrant. Even if he had proceeded to issue the warrant to the clerk, on the oath of the plaintiff, made before a justice of the peace of the city of *Baltimore*, he must, in his warrant, have distinctly recited the oath so made, by whom, before whom, &c., and it is not sufficient to refer to that oath in the terms of, "the above oath;" such a reference is too uncertain.

MAGRUDER, J., delivered the opinion of this court.

It is no reason for quashing an attachment, issued under the act of 1795, chap. 56, that the oath to be made by the creditor, was made before one justice of the peace, (of a different county;) and that another issued his warrant to the clerk of the county court, requiring him to issue the attachment. The oath may be made before "a judge of any other of the *United States*," and in the case of *Smith against Greenleaf*, 4 *Harr. & McHenry*, 291, was made before a judge of one of the courts in *Massachusetts*.

The act of Assembly is quite explicit. The creditor is to make application to "any judge of the general court, justice of the county court, or justice of the peace;" and when made to him, "the said judge of the general court, justice of the county court, or justice of the peace," is to issue his warrant. An affidavit is to be produced to him, with the cause of action;—that affidavit, however, the law does not require to be made, before the judge or justice who issues the warrant, but before "any judge of the general court, justice of the county court, or justice of the peace of this State;"—it is added : "or before any judge of any other of the *United States*,"—who, of course, is not to issue the warrant for an attachment. The justice of the peace who issues the warrant, must be of the county in which the attachment is to be issued; the oath may be made before any "justice of the peace of this State."

If, therefore, the court in deciding this case, were confined to the reasons to be found in the record, this judgment would

be reversed. It has been decided here, that in the case of a motion in arrest of judgment, the party appellant may, in this court, assign other grounds, than those which are to be found in the record; and for the same reason it seems proper, not to confine him, in cases of this description, to reasons filed with the motion to quash the proceedings. See, also, *Boarman vs. Israel and Patterson*, 1 *Gill*, 372.

This court thinks, that there is in the record a fatal objection to the proceeding by attachment, inasmuch as it does not appear, as the law requires, that the debtor was a citizen of the State. It is certainly not to be sustained, as an attachment against a non-resident, and it does not appear that he was a citizen of the State.

JUDGMENT AFFIRMED.

JOHN T. C. G. WATKINS AND WIFE, *vs.* CHARITY SEARS ET AL.—*June* 1846.

A testator devised to his son *D*, his heirs and assigns, forever, provided he shall attain the age of twenty-one years, or die leaving issue; but in case my son shall die without issue, or before he arrives at the age of twenty-one, then I give and devise to my daughters, for life, or until their marriage, &c. *D* lived to be twenty-one years of age, and died intestate, and without issue. HELD, that by his arrival at the age of twenty-one years, the property devised to him, became a vested estate.

That the word *or*, in the second clause of the devise, is to be construed copulatively, *and;* and that, thereby, the condition on which the limitation over to the daughters was made to depend, became a condition of definite failure of issue.

In this State, a limitation over of land to devisee, for life, after an indefinite failure of issue of a prior devisee, does not convert the indefinite, into a definite failure of issue.

Where there was devise of an estate in fee, with a limitation over, after a dying without issue, it was formerly converted into an estate tail, and the limitations over, operated by way of remainder. The acts of descents now converts that estate tail, into an estate in fee.

APPEAL from the Court of Chancery.

The bill in this cause, was filed on the 17th December 1844, by the appellants, and after referring to the last will of

Caleb Sears, it alleged, that shortly after making it, the said *Caleb Sears* departed this life. That after the death of the said *Caleb*, your oratrix intermarried with your orator; and that *Dennis D. Sears*, mentioned in said will, departed this life intestate and without issue, leaving *Eliza*, *Lucretia*, and *Charles*, his brother, and sisters, his heirs at law. That the said *Dennis*, on the day of his death, had attained to the age of nearly twenty-three years, and was over the age of twenty-one; and your orator and oratrix are advised, that having attained that age, he became absolutely entitled to the property devised to him, in fee simple, subject to the life estate of the said *Charity*, and that on his death, as aforesaid, intestate and without issue, the same descended to his brother and sisters, as his heirs at law; the limitation over, in case of his dying without issue, being void in law. That after the death of the said *Dennis*, the said *Lucretia* also died, without issue and intestate, leaving your oratrix, *Eliza*, and the said *Charles*, her heirs at law, so that your oratrix now claims, and your orator, in her right, claims to be entitled, by descent, to one-half of the share, or half of the said *Dennis*', or one-fourth of the whole of the said farm. That since the death of the said *Lucretia*, the said *Charles* has also departed this life intestate, leaving the following children his heirs at law, viz., *Elizabeth A. Sears*, &c. That the said half of the farm, devised, as above mentioned, to the said *Dennis D. Sears*, and which has descended to your oratrix, *Eliza*, and the infant children of the said *Charles*, is too small for, and otherwise incapable of division, without loss and injury to all parties, and is now of no use or advantage to any of them; but that the sale thereof, with the consent of the said *Charity*, would be for the advantage of all. Prayer, for the sale of the said *Dennis*' half of the said land, for the purposes of partition, and that when sold, the proceeds thereof may be distributed, according to right and equity, after assigning to the said *Charity* her portion thereof, in lieu of her life estate, and for other and further relief, &c.

The will of *Caleb Sears*, dated 30th October 1829, devised: "*First.* I bequeath and devise to my beloved wife, *Charity*, all my estate, both real and personal, during her natural life, and no longer; and after her death, I direct, that the farm on which I now reside, called the "*Plains*," shall be divided into two equal parts, as to number of acres, by an east and west line; and the southern half of the said farm, I give and devise to my son, *Charles C. Sears*, his heirs and assigns forever; and the northern half of the said farm, I give and devise to my son, *Dennis D. Sears*, his heirs and assigns, forever, provided he shall attain the age of twenty-one years, or die, leaving issue; but in case my said son, *Dennis*, shall die without issue, or before he arrives at twenty-one years of age, I then give and devise the said northern half of my farm to my two daughters, *Lucretia* and *Eliza*, to be equally divided between them, so long as they shall remain unmarried; but whenever either, or both of my said daughters shall die or marry, I give and devise the portion or portions, of the daughter or daughters, so dying or marrying, to my son *Charles*, his heirs and assigns forever."

Charity Sears, the widow of the said *Caleb*, answered the bill, consented to a sale, and to take a proportion of the proceeds thereof, for her life estate.

The other defendants, infants, also answered the bill, by guardian, and proof was taken to show the estate incapable of division, &c., as alleged.

On the 19th April 1845, the Chancellor (Bland,) decreed, that the bill of complaint be dismissed, with costs, being of opinion, that it was the intention of the testator to give the half of his land to his son *Dennis*, in fee, in case he should leave any child or issue, living at the time of his death; but if not, then it was to pass to the testator's daughters, as specified; and afterwards, to his son *Charles*, in fee.

The complainants appealed to this court.

The cause was argued before Archer, C. J., Dorsey, Chambers, Magruder and Martin, J.

By NICHOLAS HAMMOND and MCLEAN for the appellants, who cited :—

Soulle vs. Gerard, Cro. Eliz., 525. *Walsh vs. Peterson*, 3 *Atk.*, 193. *Framningham vs. Bond*, 1 *Willson*, 140. *Fairfield vs. Morgan*, 5 *Boss. and Pull.*, 38, 55. *Lessee of Hauer vs. Shutz*, 2 *Binney*, 532. *Dallam vs. Dallam*, 7 *H. & John.*, 220. *Raborg vs. Hammond*, 2 *H. & Gill*, 53. *Arnold vs. Buffum*, 2 *Mason*, 208. *Lippett vs. Hopkins*, 1 *Gall*, 454, 461. *Sayward vs. Sayward*, 7 *Greenleaf*, 210. *Grant, et al., vs. Dyer, et al.*, 2 *Dow*, 87. *Jackson vs. Blanshan*, 6 *John.*, 56. 1 *Jarman on Wills*, 441. *Barlow vs. Salter*, 17 *Ves.*, 479. *Newton vs. Griffith*, 1 *H. & G.*, 119. *Lillibridge vs. Adie*, 1 *Mason*, 224. *Hoxton vs. Archer*, 3 *G. & J.*, 199. *Haines vs. Witmer*, 2 *Yates*, 407. *Dart vs. Dart*, 7 *Conn*, 250. 2 *Jarman on Wills*, 434. *Tenny, Lessee of Agar, vs. Agar*, 12 *East.*, 253. *Smith vs. Smith*, 2 *H. & J.*, 314. *Wells vs. Beall*, 2 *G. & J.*, 458. *Pow. on Dev.*, 257.

By B. T. B. WORTHINGTON and A. RANDALL for the appellees, who cited :—

Powell on Devises, 21 *Law Lib.*, 37. *Barker vs. Suretees*, 2 *Strange*, 1175, *and note*. *Van Middlesmith vs. Schenck*, 3 *Halstead*, 29. *Den &c., vs. Laquear*, 1 *South.*, 301. *Fsodick vs. Cornell*, 1 *John.* 440.

DORSEY, J., delivered the opinion of this court.

By the devise on which the questions before us arise, the testator gives the land in dispute, "to his son, *Dennis D. Sears*, his heirs and assigns forever, provided he shall attain the age of twenty-one years, or die, leaving issue; but in case my son *Dennis* shall die without issue, or before he arrives at twenty-one years of age, I then give and devise the said northern half of my farm to my two daughters, *Lucretia* and *Eliza*, to be equally divided between them, so long as they remain unmarried; but whenever either, or both of my said daughters, shall die or marry, I give and devise the portion or portions, of the daughter or daughters, so dying or marrying, to my son *Charles*, his heirs and assigns, forever."

It is wholly unnecessary, in this case, to enquire, or to examine the authorities referred to, whether the first part of the devise to *Dennis*, was a condition precedent, or a condition subsequent; as, by his arrival at the age of twenty-one years, the property devised to him became a vested estate.

That the word, "or," in the succeeding part of the devise, prescribing the condition, on which the limitation over to the daughters, was to take effect, is to be construed copulatively, as if it were, "and;" and that, thereby, the alternative condition, (literally construing the will,) of indefinite failure of issue, upon which the limitation over is made to depend, became a condition of definite failure of issue, we regard as too clear for argument, upon the following authorities: *Pells vs. Brown*, *Cro. Jac.*, 590. *Belles vs. Gillespie*, 5 *Randolph's Reps.*, 273. *Broaders and wife vs. Turner*, *Ib.*, 308. *Arnold and another vs. Buffum*, 2 *Mason*, 208. *Doe vs. Taylor*, 2 *Southard*, 413. *Fairfield vs. Morgan*, 5 *Bos. & Pul.*, 38. *Lessee of Day vs. Day*, 16 *East.*, 67. *Framningham vs. Brand*, 1 *Wilson*, 140. *Lessee of Hauer vs. Shutz*, 2 *Binm.* 532. *Raborg vs. Hammond*, 2 *Harr. & Gill*, 53; and *Dallam vs. Dallam*, 7 *Harr. & Johns.*, 220.

That, in this State, a limitation over of land to a devisee, for life, after an indefinite failure of issue, does not, as has been contended in the argument of this case, convert the indefinite into a definite failure of issue, we think fully established by the cases of *Newton vs. Griffith*, 1 *Harr. & Gill*, 111; and *Hoxton vs. Archer*, 3 *Gill & Johns.*, 199.

But suppose, as has been urged in the argument for the appellees, the word, "or," above mentioned, is to be construed disjunctively; and that the limitation over, after a dying without issue, means an indefinite failure of issue; how does that better their condition? By such a construction, the fee-simple estate given to *Dennis*, in the first part of the devise, is converted into an estate tail, and the limitations over operate by way of remainder, not by way of executory devise: and the act of descent of this State, would convert the estate tail, into an estate in fee; whereby the limitation over to *Charles* and his heirs, becomes wholly inoperative and void. The appel-

lants, therefore, are clearly entitled to the relief sought by their bill.

This court will sign a decree, reversing the decree of the Chancery court, and remanding the case to the Court of chancery, that such further proceedings may be had therein, as the nature of the case may require.

DECREE REVERSED AND CAUSE REMANDED.

The Savage Manufacturing Company *vs.* Henry H. Owings.—*June* 1846.

Upon an application by petition to the county court to open a road, a commission was ordered, and the court adjudged the road to be opened. Held, that an appeal did not lie from that decision.

Unless by express provision of some act of Assembly, an appeal will not lie in any case in which a writ of error would not lie.

The jurisdiction of the county courts, in opening roads, is not exercised by virtue of its general powers as a court of common law, but by virtue of a special delegation of power.

A writ of error will not lie to a court vested with special jurisdiction, and which does not proceed according to the forms of the common law.

Courts of law will incidentally enquire into the validity of the judgments of special jurisdictions, whenever such enquiry becomes necessary in the exercise of their ordinary powers.

Appeal from *Howard District* court.

On the 27th September 1842, the appellee and others, filed their petition in the said court, stating, that they and others, were interested in having a road opened and straightened in *Howard District;* to begin at the junction of the old *Anne Arundel* county road with the *Columbia Turnpike*, near, &c., running through the lands of the appellant and others, to the *Washington Turnpike Road*, about five miles in length; that the public convenience directed, that the said road should be opened, &c., and made a public county road; that a road running almost exactly where it is intended this road shall run, has been used for a great number of years by a large proportion of the people of the neighborhood, as their road to church,

mill and market, they believing the same to be a public highway, until recently, an agent of the appellants threatened to hinder and obstruct some of your petitioners, and others, in the use thereof. Prayer, to open and straighten the road, for general relief, and a commission, as directed by the acts of Assembly.

A commission was issued, and the route of the road surveyed; reported favorably upon, &c., and returned to the court.

The appellants filed a *caveat* against the confirmation of the commissioner's return; but the court, on the 11th March 1844, confirmed the report, and adjudged the road to be opened and straightened. The appellants then moved the court to strike out the judgment of confirmation, and suggested a variety of grounds for their motion; all of which the district court overruled; and from all which they appealed to this court.

The cause was argued before ARCHER, C. J., CHAMBERS and MARTIN, J.

By N. WILLIAMS for the appellants, and
By N. BREWER, of J., and A. RANDALL for the appellee.

CHAMBERS, J., delivered the opinion of this court.

By the statute law of this State, an appeal is authorised, as a more convenient and less expensive mode than the writ of error, by which to take the proceedings of a common law court, or court of equity, into the Court of Appeals for revision. Unless by the express provision of some act of Assembly, an appeal will not lie, in any case in which a writ of error would not lie.

It is not claimed, that in relation to the case before us, there is any express provision, by act of Assembly, authorising an appeal.

Jurisdiction of this proceeding is not exercised by the county court, in virtue of its general powers, as a court of common law; it is vested by a special delegation of power, and by the terms of the act which confers it, to be exercised, not according to the forms and course of the common law, but in a special and peculiar mode.

Very many instances occur in our statutes, of such peculiar jurisdiction confided to the county courts, occasioned, without doubt, in part from the fact, that the personal and local information of the judges, qualified them to hear and decide such cases with singular advantage.

Where, from the probable occurrence of legal difficulties, or from other causes, the legislature deemed it proper that the decision should be revised in the superior court, it has been so expressly declared, as in the case of trials upon allegations of fraud against an insolvent petitioner, or upon issues from the orphans court, and other instances.

This peculiar jurisdiction, is, in some instances, conferred also upon inferior tribunals, not considered as courts of common law, in any respect. Thus the power to open, alter, and close public roads, has been given to the levy courts, in some of the counties, concurrently with the county courts; surely no writ of error would avail, to bring before us the proceedings of a levy court, and yet if the legislature had considered it wise to provide for an appeal from the levy court to this court, in such a case, it would only be in analogy to other instances.

It is a general and sound rule, that a writ of error will not lie to a court vested with special jurisdiction, and which does not proceed according to the forms of the common law.

The courts of law will, of course, incidentally enquire into the validity of the judgments of such special jurisdictions, whenever such enquiry becomes necessary in the exercise of their ordinary powers, and it is only in this incidental mode, that their validity may be questioned.

This not being a case in which a writ of error would lie, and the act of 1818, chap. 89, being silent as to an appeal, we think the motion to dismiss must prevail.

APPEAL DISMISSED.

GEORGE W. MORELAND *vs.* W. W. BOWLING.—*June* 1846.

Where process is duly returned, the party affected by it is bound to take notice of the proceeding; and in proper time, and while the process is before the court, move for any order or judgment in relation to it.

Parties have a day in court, for the purpose of being heard; and failing to avail themselves of it, they must thenceforth submit to the injury or inconvenience which their own neglect has occasioned.

Where the return of a sheriff is not made to the term at which the process is returnable, but after the actual sittings of the court were over, at a day in vacation, parties objecting to it, are not bound to move until the next term.

A sheriff may retain a *fi. fa.* in his hands, after a levy, and after an ineffectual effort to sell, not only until the return day has passed, but until several terms have passed, and may then sell.

It is at the option of the plaintiff to rule a return of the *fi. fa.* and issue a *vendi. exponas;* or to allow the sheriff to continue to act under the *fi. fa.*

On a motion to set aside a sale returned under a *fi. fa.*, it is the necessary and uniform practice, to examine into all the facts by parol or other proof, and not regard technical estoppels.

The act of 1816, chap. 129, is express, that notice of a sale under a *fi. fa.*, should be set up at two or more public places in the county, besides the court house, and upon failure to give such notice, the sale will be set aside, on motion made in due time when the writ is returned.

APPEAL from *St. Mary's* county court.

On the 31st January 1845, *William W. Bowling* sued out a writ of *fieri facias*, upon judgment against *George W. Moreland* and *Henry G. Garner*, returnable to the 1st Monday in March of that year. This writ was levied the 1st and 3rd February 1845; the property sold on the 7th March 1845, and the writ returned to the county court.

At March term 1845, the appellant moved to set aside the sale:

1. That due and legal notice was not given to the defendant, and the public, of the time and place of sale.

2. That all the property sold, except, &c., was absent at the time of sale, and thereby the public was prevented from judging of its value.

3. The whole property, real and personal, was sold at a grossly, inadequate price.

4. The real estate was worth three times as much as it sold for, and would sell for; that the sale was made at *Leonardtown*, a great distance from the land and real estate.

5. The sale was made under a *fi. fa.*, and the sheriff, in the execution of a sound discretion, ought not to have sold it, but returned it, and obtained a *venditioni exponas*.

6. That the property was sold after the return day of the *fieri facias*.

7. That the return of the sheriff on its face, avoids the sale, as it states, that the purchase money was first paid.

8. That more property was sold than was necessary to pay the executions.

At the hearing of the motion, a variety of depositions were filed, as to the value of the property; its situation and condition at the time of sale.

The sheriff who made the levy, deposed, that "he gave upwards of twenty days clear notice of sale in the *Leonardtown Herald*, a paper published in *St. Mary's* county, at the court house door, and at no other place." The land lay about fifteen miles from *Leonardtown*.

It also appeared, that return of the execution, made by the sheriff, was not made at the regular March term of 1845, but that the sheriff brought it into the clerk's office in vacation, sometime in May 1845, when the entry of the return of sales was made; that after the adjournment of the regular March term, the rule return of the *fi. fa.*, was entered by the clerk, as under a general order of the court.

The county court overruled the motion to quash the sale, and the said *G. W. Moreland*, one of the defendants, and whose property was levied upon, appealed to this court.

The cause was argued before Archer, C. J., Dorsey, Chambers, Spence and Martin, J.

By Crain for the appellant, and
By Thomas for the appellee.

Chambers, J., delivered the opinion of this court.

Where process is duly returned, the party affected by it is bound to take notice of the proceeding; and in proper time, and while the process is before the court, move for any order or judgment in relation to it.

Parties have a day in court, for the purpose of being heard; and failing to avail themselves of it, they must thenceforth submit to the injury or inconvenience which their own neglect has occasioned.

The present case, however, is not embraced by these principles, which regulate the general practice, and which we do not mean to disturb. The return of the sheriff was not made to the term at which the writ was returnable, nor could it be, as the sale was made at a day subsequent to the return day. To require a party to take exception to a sale, under a *fi. fa.*, at the term to which the writ is made returnable, as a universal rule, (as contended for by the appellee's counsel,) would be a manifest denial of justice.

A sheriff may retain a *fi. fa.* in his hands, after a levy, and after an ineffectual effort to sell, not only until the return day has passed, but until several terms have passed, and may then sell. It is at the option of the plaintiff to rule a return of the *fi. fa.* and issue a *vendi. exponas;* or to allow the sheriff to continue to act under a *fi. fa.*

Now, in such a case, where the sale has not been made until two terms have passed, would it not be a mockery to say to an injured defendant, or his other creditors, that redress would have been given if the application had been earlier? The law requires no such impossibility, as to move to set aside a sale before it is made. It is sufficient that it be made at the term, to which the writ is in fact returned.

In this case, the return was placed in the clerk's office in vacation;—it was not in any proper sense "returned to the court" at that time, for the court was not in session. It must be regarded as made to the ensuing August term, and at that term the motion was made.

It is objected, that the record states the return to be made to the March term, and cannot be contradicted. The record also states, that the return was not made pursuant to the command of the writ, and a rule is entered requiring the return, but not limiting any particular day therefor. But, on motion of this kind, it is the necessary and uniform practice, to examine into all the facts by parol or other proof, and not regard technical estoppels.

The authority of the court being shown, to examine into the facts, there can be no doubt of the propriety of granting the motion to set aside the sale.

Without going into the other considerations, which might lead to the same result, it is sufficient, that legal notice has not been given.

The sheriff himself, proved, that the notice of sale had been published in a newspaper;—and set up at the court house door, and at "no other place." The act of 1816, chap. 129, is express, that notice should be set up at two or more public places in the county, besides the court house.

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ARBITRATION—AWARD.

1. Where the nature of an enquiry before arbitrators was such, as to render notice of their intended action necessary, a prayer founded upon the supposed sufficiency of their award, in an action upon it, which is silent upon the question of notice, and claims that the plaintiff is entitled to recover upon the award, irrespective of notice, though there was evidence of it, ought not to be granted. *Bullitt vs. Musgrave*, 31.
2. Where, from the nature of a submission, the judgment of arbitrators may be influenced or enlightened by the adduction of evidence, the parties are entitled to notice of the time and place of their proceeding to investigate the matters submitted to them. *Ib.*
3. Where, by an agreement to rent a fishery, the tenant had the privilege of getting timber out of the lands of his landlord for the purpose of erecting buildings, which, when erected, were to be the property of the landlord so far as his timber was used, and the tenant was to be at liberty to remove the materials he might supply, so far as it could be done without injury to the landlord's interest; and an agreement was subsequently made to purchase the tenant's materials, and refer the value of them to arbitrators, who, without notice to the parties, proceeded to make an award. Held: that under such circumstances it was an open question of fact, whether matters had not been awarded upon, which had not been submitted. *Ib.*
4. Where matters not submitted are included in an award, which cannot be separated from the matters referred, the award is void, unless what had been done by the arbitrators has been subsequently ratified by the parties to be affected by their act. *Ib.*
5. An agent appointed to submit a claim to arbitration is not thereby authorized to ratify and confirm the award when made. *Ib.*
6. When the design of one party was to purchase, and the other to sell materials, which, by the terms of a lease, the latter had a right to remove at the end of his term, and an agreement in relation to such purchase was submitted to arbitrators; if purchase money is to be paid, it should appear what were the articles appraised, so that the vendee might obtain title; and where some of the articles were particularized, and some were not, but were included under an *et cetera*, the award is uncertain and void. *Ib.*
7. Under the act of 1785, ch. 80, sect. 11, the courts have power to enter judgments on awards returned under that act, notwithstanding

ARBITRATION—AWARD—*Continued.*

the death of either of the parties to the cause referred. *Turner vs. Maddox*, 190.

See CONTRACT, 2.

ASSIGNMENT—ASSIGNOR—ASSIGNEE.

1. *C* brought an action of debt against the maker of a single bill, payable to *B*, and declared upon it under the act of 1829, ch. 51, as assigned to him in writing. The defendant pleaded in bar, that it was not assigned in writing to the plaintiff, but endorsed in blank by the obligee; upon general demurrer the court rendered judgment for the plaintiff. *Chesley vs. Taylor*, 251.
2. The assignee of a bond, or other chose in action, is unable to maintain an action on the instrument, in his own name, by the provisions of the act of 1829, unless there was an assignment of it in writing, signed by the party authorised to make the same. *Ib.*
3. A non-resident had goods in the State, which he assigned, *bona fide*, in payment of a precedent debt, to a resident; and the warehouseman, with whom the goods were deposited, accepted the order of the assignor to deliver them to the assignee. A few days after this, they were attached, as the property of the *non-resident* assignor. The assignee appeared in the cause and claimed them; HELD, it was not necessary that the assignment should have been recorded, under the act of 1834, chap. 79, sec. 3, to perfect the transfer. *Wells et al., vs. Biscoe*, 406.

See BILLS OF EXCHANGE, 4.
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JUDGMENT, 2.

ASSUMPSIT. *See* CONTRACT.
COVENANT, 1.
FRAUD, 1.
PARTNERSHIP.

ATTACHMENT TO COMPEL APPEARANCE.

1. Under the act of 1795, ch. 56, a citizen of *Maryland* is authorised to proceed, by attachment, against any person *bona fide* indebted to him, who is not a citizen of this State, and doth not reside therein. It also prescribes the form of proceeding. *Barr, Garnishee, vs. Perry*, 313.
2. The garnishee, in an attachment cause, may plead in bar, that at time of issuing the attachment, the alleged debtor was a citizen of the State, and residing therein; the non-residence of the debtor in this case, was as essential as his indebtedness. *Ib.*
3. The plaintiff in an attachment cause cannot, by his affidavit, conclude the garnishee, upon the question of jurisdiction in the court. He may deny, by plea, the truth of facts essential in such affidavit, and thus show the court had not jurisdiction rightfully. *Ib.*
4. Under the act of 1715, no attachment can issue against a resident defendant, until a second *capias* shall have been returned *non est*. *Ib.*

ATTACHMENT TO COMPEL APPEARANCE—*Continued.*

5. It has been repeatedly decided, that if the affidavit of the creditor is in any respect defective, its defects may be relied on in any stage of the proceedings. *Ib.*
6. The necessity of an averment in the affidavit, of the citizenship of the plaintiff, is now done away with by the act of 1834; but whether it be there stated or not, that act requires the plaintiff, at the time of trial, to prove his citizenship. *Ib.*
7. The affidavit is indispensable, in order to give to a magistrate authority to order an attachment by the clerk of the county court, but when the court gives judgment, it must be because there is legal proof, that the debtor, in the language of the act, is not a citizen of the State, and not residing therein. *Ib.*
8. At some stage of the proceedings, and in some form or other, the garnishee must have the power of denying the truth of the matters charged in the affidavit. *Ib.*
9. The design of the attachment law is, as well to protect our own citizens, while within the reach of the State's process, against any such summary proceeding, as to give the citizens of the *United States* a remedy against debtors, whose persons are out of the reach of our process, but who have property within our territory and jurisdiction. *Ib.*
10. The plaintiff in attachment need not file a declaration. The plea of the garnishee is to the writ of attachment, and the business of the plea is, to show why the attachment should be quashed. *Ib.*
11. By the acts of 1832, ch. 280; 1834, ch. 79; and 1839, ch. 39, there is a departure from what has been called the theory of our attachment laws. *Ib.*
12. Originally, the simple object of an attachment was, to compel the debtor to give bail, and appear to the ordinary suit, and that object being accomplished, the attachment was necessarily dissolved. *Ib.*
13. The design of the later laws was to continue to the creditor, who has been obliged to have recourse to this process, the lien, which, by the service of the attachment, he had on the property attached, unless the debtor will give other and better security than that which is afforded by giving bail. *Ib.*
14. Bail may be given, and at any time might be discharged, by surrendering the principal, and thus the creditor might be deprived of his lien, and have no security for his debt. *Ib.*
15. The law now leaves the non-resident debtor still at liberty, by giving bail to get the control of the suit, but forbids the dissolution of the attachment, unless bond, with approved security is offered. *Ib.*
16. But, these laws relate to non-resident debtors, and must be confined to them; they do not relate to abuse or misuse of the process of the court, and must not be construed to apply to suits against residents. *Ib.*
17. The act of 1834, ch. 79, is confined to debtors non-resident of the State. *Ib.*
18. The act of 1839, ch. 39, extends the provisions of the act of 1834. It

ATTACHMENT TO COMPEL APPEARANCE—*Continued.*

includes absconding debtors, and is for the benefit of a plaintiff, or plaintiffs, one of whom resided within the State; and, moreover requires, that the defendant, or some one of the defendants, should have been a citizen of the State, at the time when the contract was made, or the debt or damages accrued, upon which an attachment may issue. *Ib.*

19. If the plaintiff intended to avail himself of the act of 1839, in answer to the plea of the garnishee in this case, he should have made it the subject of a replication. *Ib.*

20. Where an attachment was granted to compel an appearance, on the ground, among others, that the defendant was a non-resident, and he was arrested, appeared, and gave bail to the action, this does not dissolve the attachment as formerly. Both cases will be in court, viz., that against the defendant, as well as that against the garnishee. The defendant will get the conduct of his own suit. The plaintiff may get judgment in both. The proper course will be to delay the trial of the attachment, until a trial is had against the debtor defendant. *Ib.*

21. The court is not precluded, by these later acts, from ascertaining the truth, and giving the alleged debtor relief, if his property has been wrongfully seized. *Ib.*

22. The decision of the county court, permitting the garnishee in an attachment cause, to file pleas in bar, and to the merits, is not the subject matter of an appeal. *Ib.*

23. A non-resident had goods in the State, which he assigned, *bona fide*, in payment of a precedent debt, to a resident; and the warehouseman, with whom the goods were deposited, accepted the order of the assignor to deliver them to the assignee. A few days after this, they were attached, as the property of the *non-resident* assignor. The assignee appeared in the cause and claimed them; HELD, it was not necessary that the assignment should have been recorded, under the act of 1834, chap. 79, sec. 3, to perfect the transfer. *Wells, et al., vs. Biscoe*, 406.

24. It is no reason for quashing an attachment, that the affidavit of the creditor was made before a justice of the peace of one county, while the warrant to the clerk of the county court, to issue the attachment, was granted by a justice of his county. *Dickinson vs. Barnes*, 485.

25. The justice of the peace, who issues the warrant, must be of the county in which the attachment is to be issued. *Ib.*

26. Upon a motion in arrest of judgment, the appellant may assign other errors than those which are to be found in the record. So upon a motion to quash an attachment. *Ib.*

27. To procure an attachment against an absconding debtor, the affidavit of the creditor should allege, that the debtor was a citizen of this State. *Ib.*

ATTACHMENT ON JUDGMENT. *See* EXECUTION.

ATTORNEY AT LAW.

1. The relation of a solicitor to the complainant in the cause, where the former is appointed a trustee, to make a sale by decree, becomes dormant when the decree is obtained. The solicitor, when he was appointed trustee, assumed a new character. Unauthorised receipts of money by the trustee, will not be sanctioned in virtue of any supposed relation of client and attorney. *Farmers Bank of Md. vs. Mackall and Tilton*, 447.
2. An attorney, after judgment or decree, has power to collect the debt by execution. *Ib.*

BAIL. *See* ATTACHMENT TO COMPEL APPEARANCE, 14.

BANKRUPTS.

1. A debt created in *London*, is not extinguished by a discharge of the debtor under the bankrupt act of the *United States*. *Lizardi, et al., vs. Cohen, et al.*, 431.
2. In a contest between two creditors of a discharged bankrupt, one of whom resided in this country, and the other in *London*, where the cause of action arose, the latter cannot prove by the bankrupt, his title to property hypothecated to him as collateral security, by the witness, who, still remaining liable to the foreign creditor, is interested in sustaining the claim for his own relief. *Ib.*

BANKS.

1. The banks of this State are secured in the privilege of issuing checks, bills of exchange, and certificates of deposite. *Burton et al., vs. The State*, 1.
2. The original charters of the "*old banks*," as they are termed, will expire on the 10th March 1846. *Ib.*
3. The cashier of a bank possesses no incidental authority to make any declarations binding the bank, not within the scope of his ordinary duties. *Merchants Bank vs. The Marine Bank*, 96.
4. If the cashier of a bank promise to pay a debt which the corporation did not owe, or was not liable to pay, or should admit forged bills to be genuine, such promise or admission would not bind the bank, unless it had authorised or adopted the act. *Ib.*

See STAMPS.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. On the 20th September 1839, the *Marine Bank* issued their certificate of deposite, payable to *S* or order. It was mailed for *St. Louis*, and an endorsement by *S*, forged, when it was passed to *B* of *Illinois*, for value, *bona fide;* that house remitted it to *H* of *New York*, who remitted it to *W* of *Baltimore*, customers of, who deposited it with the *Merchants Bank* for collection, and obtained a credit for it in account, on the 2nd November. On the 4th, the *Marine Bank* paid it to the *Merchants Bank*. On the 21st, the former institution discovered the forgery, immediately gave notice to the latter bank, and demanded its payment. Between the 2nd and 18th November, *W* had always to his credit with the *Merchants Bank*, a

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

larger sum than the amount of the certificate. On the 19th it was less, but on the 20th, 21st and 22nd, it was again greater. There were daily transactions deposites and checks, by *W*, with and on the *Merchants Bank*. The *Marine Bank* having paid the certificate to the real payee, brought an action against the other bank, which it had also paid previously, to recover back the amount of the certificate. HELD:

1st. That if the *Merchants Bank* was a *bona fide* holder of the certificate, for value paid, it would not have been responsible in this action. *Merchants Bank vs. Marine Bank*, 96.

2nd. There was evidence, that on the day on which the forgery was discovered, and the demand made on the defendants to refund the money, that there was standing to the credit of *W*, on the books of the *Merchants Bank*, a larger sum than the amount of the certificate. *Ib.*

3rd. If at the time the forgery was discovered, and the demand of payment made, *W* had withdrawn from the *Merchants Bank* the balance to his credit, the *Merchants Bank* would then have been a *bona fide* holder for value. *Ib.*

4th. The credit to *W* on the books of the bank for the amount of the certificate was not conclusive, and did not prevent the bank from correcting the account when the forgery was discovered; if it then had funds in their possession adequate to that purpose, the credit was only *prima facie* evidence. *Ib.*

2. A blank endorsement and delivery of a bill constitutes the party to whom it was delivered, its absolute owner; and conferred upon the holder the power to fill up the blank, with a full assignment of the interest to himself. *Chesley vs. Taylor*, 251.

3. When the blank is filled up, it becomes an assignment in writing by the party who endorsed it in blank; and though the assignment may not be completed until the time of trial, it is regarded, for the purposes of the suit, as having been made when the instrument was endorsed. *Ib.*

4. An accepted bill, unless drawn on a particular fund, does not operate to invest the payee with the character of an assignee of the fund. *Sheppard, et al., vs. The State*, 289.

5. Taking a promissory note for a simple contract debt, does not, *per se*, extinguish the original cause of action. *Morgan vs. Bitzenberger*, 350.

6. Where a note of the debtor was taken for a debt, and the creditor afterwards sues him upon the original contract, proof that the note was redelivered to the debtor, sufficiently accounts for its absence at the trial. *Ib.*

7. The order of a debtor on a third party, given to his creditor, which was dishonored, and tendered to the debtor, interposes no objection to recovery upon the original consideration. *Ib.*

8. Bills of exchange drawn in *New York*, upon a house in *London*, and there accepted and paid, if, in connexion with other circumstances,

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

they create a claim by the acceptor against the drawer, are to be considered as creating one in *London*, which is the place of the contract. *Lizardi, et al., vs. Cohen, et al.*, 430.

See STAMPS.

BILL OF PARTICULARS. *See* PLEADING, 6, 7.

BOND.

1. In an action upon an appeal bond, with condition to prosecute an appeal from a judgment of a justice of the peace, with effect, &c., it is no defence, since the act of 1829, ch. 236, that the bond was executed more than sixty days after the date of the judgment therein recited, and from which the appeal was taken. *Brewer and Draper, vs. Smith*, 299.

2. It appeared on the face of a guardian's bond, that it was originally filed " — *day of December* 1823;" that the date was altered to "*the 3rd day of May* 1824;" that by the minutes of the Orphans court, and endorsement on the bond, it was received, endorsed, and placed upon record, the 3*rd May* 1824. HELD: that this alteration was wholly immaterial, and did not, in the least degree, tend to alter or enlarge the liability of the defendant. *State, use of Firey, vs. Miller*, 335.

3. The alteration of the date of a bond being, under the circumstances, wholly immaterial, and not made by the obligee, the plaintiff, its validity is in no manner affected by the defendant's, the obligor's, failure to consent to such alteration. *Ib.*

4. Where a testator devised his estate to his children, share and share alike, but declared, that if his son should elect to carry on the business in which the father was then engaged, he should have for that object his entire estate, and in that event, pay his brothers and sisters, at a valuation which the will directed to be made; and the son so elected, and took the estate, all the debts being paid, the testamentary bond of the executor is discharged. *Ellicott vs. Early and Ellicott*, 439.

See ASSIGNMENT, 1, 2.

PRINCIPAL AND SURETY, 1, 2, 3.

STAMP.

CALLS. *See* EJECTMENT.

CASES EXPLAINED OR OVERRULED.

1. The case of *Caborne vs. Godfrey*, 3 *Dessau*, 517, overruled as to the plea of limitations. *Dugan et al., vs. Gittings et al.*, 138.

CASHIER. *See* BANKS, 3, 4.

CERTIFICATE OF DEPOSITE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

CHECK. *See* STAMP.

CHURCH PROPERTY.

1. By the act of 1798, ch. 24, sec. 29, "No vestry can sell a lien, or transfer any of their estates or property belonging to the church, without the consent, at least, of five of their body,"—rector, church

CHURCH PROPERTY—*Continued.*

wardens, and bishop of the *P. E. Church.* The assent of vestrymen, to a decree for the sale of church property, in this case must be regarded as implied admission, that the debt claimed was due, as they have no power to make a voluntary sale of the property. *Allender et al., vs. Vestry of Trinity Church*, 166.

CITY OF BALTIMORE.

See MAYOR AND C. C. OF B.

COLLECTORS OF COUNTY LEVIES AND TAXES.

1. A party for whom a sum of money is levied by the commissioners of a county, has a remedy upon the collector's bond for his payment. His rights are within the very terms of the bond. *Sheppard et al., vs. The State*, 289.
2. The collector's bond is also answerable to a party for whom money is levied, who has given up to the collector the order of the commissioners on him, and received in lieu thereof, his due bill. *Ib.*
3. Where such a party has assigned away only a portion of his claim to another, or portions of it to several, who, also, obtained the collector's due bill, the bond is not answerable to such assignees; otherwise it would sanction a principle most burthensome to the securities. *Ib.*
4. Neither is the collector's bond responsible, where a bill of exchange, or order, drawn by the assignee of a claimant, under the levy, was accepted by the collector, unless such acceptance were produced at the trial, to show it was not outstanding in the hands of third parties. *Ib.*

CONDITION.

See COURT OF CHANCERY, 24, 25, 26, 27, 28, 29, express, in equity, how dealt with.

WILL AND TESTAMENT, 18.

CONSTITUTIONAL LAW.

1. By the act of the extra session of 1841, ch. 23, the interest or proportion in all ships or other vessels, whether in port or out of port, owned by persons resident of the State, are directed to be valued, as other property is directed, and charged according to such valuation with the public assessment of twenty cents in every hundred dollars of assessed value. HELD: that the tax was a constitutional and valid exercise of power by the State. *Howell vs. The State*, 14.
2. The power of Congress to regulate the coasting trade, is plainly deducible from that clause of the constitution, which has granted to the national government the power to regulate commerce among the several States. *Ib.*
3. The term, commerce, includes navigation. *Ib.*
4. The right to tax is an incident of sovereignty, and is co-extensive with that to which it is incident. All subjects over which the sovereign power of the State extends, are objects of taxation, but those

CONSTITUTIONAL LAW—*Continued.*

over which it does not extend, are upon the soundest principles exempt from taxation. *Ib.*

5. The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but it does not extend to those means which are employed by Congress, to carry into execution powers conferred on that body by the people of the *United States*. *Ib.*
6. The decisions of the Supreme Court of the *United States* on constitutional questions are conclusive. *Ib.*
7. Property in ships and vessels was, before the adoption of the constitution of the *United States*, embraced by the taxing power of the State. *Ib.*
8. The power of taxation extends to all the people of the government, and embraces every thing which may be fairly considered as constituting a part of the mass of property within the State. *Ib.*
9. The interest in ships and vessels is private property, and belonging to a citizen of *Maryland*, living within her territory, subject to her jurisdiction, protected by her laws, is a part of his capital in trade; and like other property the subject of State taxation. *Ib.*
10. The States still hold all the powers which they originally possessed, except such as have been delegated to the *United States*, or prohibited to the States. *Ib.*
11. The general government has created a large class of subjects, without the reach of the taxing power of the States. The fiscal agents of the government; the army and navy; the judicature of the *United States;* the public ships; the national institutions and property are exempt from State taxation. *Ib.*
12. A restriction of a power created by implication, supposes that but for the implied limitation the power would have existed, and might have been exercised. *Ib.*
13. The institutions of the *United States*, though within the territory, are constructively without the local jurisdiction of the States in every respect and for every purpose including that of taxation. *Ib.*
14. Where there is a conflict between rights under the law of the local government and a law of Congress, the State law must yield to that which is supreme and paramount. *Ib.*
15. To render a State law unconstitutional, or extinguish a State power by implication, on the ground that it is repugnant to powers vested in the general government, the repugnancy must be clear, immediate, and direct; and not merely speculative, indirect, and contingent. *Ib.*

CONSTRUCTION OF ACTS AND STATUTES.

1. Statutes in *pari materia*, are to be construed together. *Dugan et al., vs. Gittings et al.*, 138.
2. A latter statute on a given subject, not repealing an earlier one, in terms, is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter. *Ib.*

CONSTRUCTION OF DEEDS, GRANTS, AND PATENTS.

See CONTRACT, 2.
COURT OF CHANCERY, 21, 23.
COVENANT, 1.
DEEDS.
WILL AND TESTAMENT, 19.

CONTRACT.

1. In an action by an administrator, to recover the value of goods sold and delivered by him, where the issues were made up on the pleas of *non assumpsit*, and payment, the defendant proved the admission of the plaintiff to the defendant, that there was no necessity for the defendant giving his notes for the articles purchased, as he, the plaintiff, would give the defendant credit for the amount, on a judgment due from the plaintiff's intestate to the defendant. There was no evidence that the defendant consented to the arrangement. HELD, no defence to the action. *McKee vs. Baden*, 237.
2. Where the contract declared, that a party should be paid for work, "as much money as such work shall be worth, upon a reasonable valuation," the true construction of this is, that the party shall be paid as much money as the work when done shall be reasonably worth, and not that the party claimant should procure a valuation, to be made as a rule of evidence. The parties did not designate any person to make the valuation. *Ramsburg et al., vs. McCahan*, 341.

CONTRIBUTION. *See* COURT OF CHANCERY, 40, 41.

CONVEYANCES. *See* DEEDS.

CORPORATION.

1. The objection, that a corporation sues by a wrong name, is matter of abatement, and cannot be taken upon the trial of the general issue. *Bank of Metropolis vs. Orme*, 443.

COURT OF APPEALS. *See* PRACTICE IN COURT OF APPEALS.

COURT OF CHANCERY.

1. A vendee of an estate, in an unexecuted contract, is entitled to have that for which he contracted, before he can be compelled to part with the consideration he agreed to pay. *Buchanan et al., vs. Lorman*, 51.
2. The ability of the vendor to convey should exist, when his duty by the contract arises to convey; or at the time of a decree for a conveyance, where time is not of the essence of the contract. *Ib.*
3. A vendee is not bound to take an estate fettered with incumbrances, by which he may be subjected to litigation to procure his title. *Ib.*
4. After a contract for the sale of land, the vendor mortgaged the same, and upon a bill filed by the mortgagee for a sale, to which the vendee was no party, a decree was passed to sell, and the trustee directed by the decree to convey to the purchaser the rights of the mortgagor and mortgagee, which was executed by a sale and deed to the purchaser, in conformity with the decree, to all which the vendor voluntarily consented. HELD:

COURT OF CHANCERY—*Continued.*

1st. That this decree and sale operated to extinguish the vendor's title, and pass it to the purchaser. *Ib.*

2nd. That when the contract of sale had ripened into maturity, the vendor, by his own consent, had stripped himself of every vestige of title, legal and equitable, in the land he had sold, was in no condition to comply with his contract to convey, and had no legal capacity to enforce a reconveyance of the title to him, so that he might comply with his contract of sale. *Ib.*

3rd. That the vendee was not bound to take a title thus embarrassed, and embark in a lawsuit against an adversary claimant. *Ib.*

4th. That if the vendee had gone into equity to compel a specific execution of the contract, she must have averred a compliance on her part with the terms of the contract, or have offered to pay the purchase money. *Ib.*

5th. Where a bill seeks a rescission of a contract, on the ground of want of title, a payment or offer to pay is unnecessary. *Ib.*

6th. Where the consideration of a contract of sale wholly fails, the vendor, nor his assignees who stand in his stead, ought not to be allowed to recover the purchase money, and a judgment on a bond for it will be perpetually enjoined. *Ib.*

5. The vendor of land, assigned the vendee's bond, and judgment against him, for the purchase money to *L*, who, *before* the obligation to convey had matured, proceeded against the vendee's land *in another State*, obtained a decree against him for a sale, sold, and purchased the same. *L* had notice of the consideration of the bond and judgment which had been assigned to him, which entirely failed. When by the terms of the contract of sale, the period of conveyance had arrived, the vendor had no title to convey, nor any legal capacity to enforce a reconveyance to him; HELD, that if these defences had been brought to the notice of the court of equity, in the State where the decree for the sale of the vendee's land had been obtained, this court is bound to presume, that no decree would or could have passed against him, until the estate sold to him had been relieved from its embarrassments, and until the vendor, by so doing, could have shown himself in a condition to convey, according to his contract of sale. *Ib.*

6. The decree in the other State must be considered as conclusive, as to the merits, upon the equities existing anterior to it, and as having the efficacy of a domestic judgment or decree, and it could not there be examinable upon any ground of equity existing prior to its passage. *Ib.*

7. But upon an equity arising subsequent to such decree, which would make it inequitable in the present defendants, who obtained, to enforce it, the complainants in this bill may enjoin them from enforcing it. *Ib.*

8. When the person of the defendant is in *Maryland*, though the land in controversy is in *Virginia*, and the object is to vacate a decree of a

COURT OF CHANCERY—*Continued.*

court of the latter State, though this cannot be done, yet the defendant seeking to enforce such decree, may be enjoined from accepting a conveyance of lands purchased by him under it, or if he has obtained title inequitably, may be decreed to reconvey the same. *Ib.*

9. Where a vendee, upon a contract for the purchase of land, has been let into possession, and it is afterwards rescinded by decree, he is responsible for any deterioration of the property arising from his improvidence, or culpable negligence, but not otherwise; and for all the time it was occupied by him or his agents, he should account for rents and profits. *Ib.*

10. There is generally a great disproportion between rents and profits, and interest on the purchase money, so that there is no propriety in awarding interest, where the sale is rescinded. *Ib.*

11. When a contract is rescinded, a court of equity could never treat the vendor as entitled to the purchase money, nor consider the vendee as the owner of the land. *Ib.*

13. A party who seeks to recover in equity against one of the several sureties, in a trustee's bond, the whole amount of his claim against a defaulting trustee, must not only prove the insolvency of the principal in the bond, but of all the other co-securities. *Clagett, adm'r of Beanes, vs. Worthington, Trustee*, 83.

14. The co-securities, or their representatives, should be parties to such a proceeding. *Ib.*

15. The fact that a surety in a trustee's bond, is also a distributee of the fund in his hands, will not authorize another distributee to require a court of equity to apply the portion of the fund due to the first distributee, in discharge of his obligation as surety, where the trustee is in default. The remedy for non-performance is at law. *Ib.*

16. A creditor of a distributee in chancery, claiming by petition, to be paid his debt out of a fund in court to be distributed, must show himself remediless at law; or that he has some lien or title to the fund sought, which it is the duty of a court of equity to enforce. *Ib.*

17. In 1828, a trustee, under decree, made a sale of land to *H*, who he reported as the purchaser, and the sale was ratified. The purchase money was in fact paid by *S*, who went into possession, and so remained. *H* was his agent, and bought for him. In 1834, *H* executed a lease of 14 acres of land to *W*, for the purpose of raising iron ore, and agreed, that should the ore run out on the fourteen acres, *W* should have four more, whenever he saw proper, adjoining the same. The ore running out, *W* claimed to have the four acres on the land in the possession of *S*, adjoining the leased premises. HELD: that *S.* had an equitable estate in the land in controversy; that *W* had constructive notice sufficient to put him on enquiry; and that *H* could not convey to him, or his assigns, any estate in the adjoining part claimed. *Rogers vs. Scarff et al.*, 127.

18. A mere verbal, voluntary, executory agreement, although founded on the meritorious consideration of love and affection, cannot be

COURT OF CHANCERY—*Continued.*

enforced by a court of equity, and the party who made it may, at his will, violate or abandon it. *Dugan et al., vs. Gittings et al.*, 138.

19. An agreement made by a father with his daughter, in contemplation of her marriage, by way of advancement, and as a marriage endowment, followed by her marriage as then contemplated, has for its support a valuable consideration. It cannot be revoked by the father. The marriage is a consideration which vests the interest in the donee against all the world. The daughter is regarded as a purchaser, as much so, as if she had paid for the property an adequate pecuniary consideration. *Ib.*

20. In 1807, *G* conveyed to *S and others*, two lots, on which a church had then lately been erected, in trust; that the grantees upon being reimbursed all sums which have been, or may hereafter be paid and applied in and about the building of such church, release to such person or persons as shall or may be legally authorised to receive the same, all their estate in, &c., in trust for the said church. *A*, the surviving grantee, laid out a large sum upon the building, and devised the debt to the appellants, who, in 1837, filed a bill to sell the lots for repayment of their claim, against the vestrymen of the church: no person had been authorised to receive a release from the grantees. The vestrymen answered the bill, assented to a sale, but disclaimed knowledge of the amount of *A's* expenditures. HELD:

2. The right of the complainants rested upon the equitable implication of a lien.

3. The non-appointment of persons to receive a release, could only be accounted for by imparting to the vestry a knowledge of the fact, that the building of the cuurch had not been paid for.

4. The only proceeding by which a recovery could be had, was *in rem.*

5. The assent of the appellees was a waiver of the objection, that the claim was a stale one, and abandoned by lapse of time. *Allender et al., vs. Vestry Trinity Church*, 166.

21. A deed of trust was made to secure to each stockholder in an unincorporated association, a theatre, the right of free admission, until the sum lent and advanced by them for each share, to the managers and proprietors of such theatre, should be fully paid; the right of free admission being in lieu of interest, without impairing the right to receive the full principal; and in further trust, to secure the payment of all claims against the managers, for work, and labor, and materials, performed or furnished, for the use of the theatre, and for which the claimant now has, or hereafter shall have, a written acknowledgment signed by the said managers, there being two of them, or by either of them, in their joint names. A sale of the theatre being decreed, HELD: that in the distribution of the proceeds, the stockholders had no priority over the material men. *Cross et al., vs. Cohen*, 257.

22. Where it can be done without violating the plain and express terms of an instrument creating a trust, chancery will administer the fund which comes under its possession and control, under such trust, so

COURT OF CHANCERY—*Continued.*

as to give an equal portion to each creditor, which is considered but another mode of expressing its purpose, to do equal justice to all. *Ib.*

23. The order in which claims are mentioned and enumerated in a deed of trust, does not, *per se*, give any preference or priority of right. *Ib.*

24. There is no rule of equity which will afford relief to a party failing to comply with an express condition, except its performance be prevented by fraud, or fault of the adverse party, or by inability arising from unavoidable accident. *Ib.*

25. So where a claim, by the terms of a deed of trust, was required to be authenticated by a written acknowledgment, which the claimant "now has or hereafter shall have, signed by *W* and *B*, or by either of them, or in their joint names," the party, claimant, must comply with the condition. *Ib.*

26. But, although the written acknowledgment is not produced, a court of equity will entertain the enquiry, whether the condition has been in point of fact complied with. *Ib.*

27. Evidence that leaves no doubt of the fact, that at one time the claims were authenticated, as the deed required, yet that the certificates signed by *W* and *B*, were, at a subsequent period, surrendered, on an agreement to receive in lieu thereof, the certificate and promise of *W* alone, the claimants consenting to make no claim upon *B* personally, on the express condition, they should still hold their claim and lien under the mortgage to the trustees, shows, that the condition in the deed has been in fact complied with. *Ib.*

28. The parties were not required by the deed, to preserve the acknowledgment of their claims, and have it ready at all times to be produced with the claim. *Ib.*

29. The acceptance of the certificate of *W*, was no surrender of the claim under the trust. The property in the hands of the trustees, may be regarded as the primary and principal fund. *Ib.*

30. Where a creditor has a lien on a specific fund, an agreement to make no claim against one of two principals in a debt, on the express condition, that he shall retain the lien, will not defeat his remedy against the fund. *Ib.*

31. An executor who had paid specific legatees, discovering a deficiency of assets to pay creditors, and a consequent overpayment to legatees, cannot maintain an action at law to recover back such overpayment from a particular legatee. A court of law cannot take into consideration, as a court of equity would do, the mode in which the funds might have been applied. *Somervell vs. Somervell*, 276.

32. Upon a bill filed by husband and wife, against the co-heirs of the wife, to procure the division or sale of their father's real estate, of which he died seized and intestate, the fact, that one of the co-heirs, defendants, had purchased the wife's interest from her husband, and also the interest of the other heirs, no conveyance having been procured from the wife, in the mode prescribed by law, to pass the real estate of the *feme covert*, will not prevent the county court from issuing a commission, and directing and allowing an election

COURT OF CHANCERY——*Continued.*

to be made by the parties entitled, according to the act regulating descents. *Chaney et ux., vs. Tipton et ux.*, 327.

33. After an election is made, and the bonds for the purchase money are about to be given; or if the election shall be refused, when the proceeds of sale are about to be distributed, the court will take into consideration the rights of the purchaser, and adjust the details of the transaction accordingly. *Ib.*

34. The rights of the purchaser, and the means of securing his interest, must be determined by the nature of the interest acquired by him. *Ib.*

35. Under the act to direct descents, the alienee of an heir, in the cases therein provided for, is authorized to stand in the place of his vendor, as to the right of election or distribution. *Ib.*

36. If his interest or claim be such as a court of equity will specifically enforce, the remedy must be sought by the proper process of the Chancery court: for any other contract in relation to land, the ordinary remedies at law, or in equity, as the case may require, will be open to the party entitled. *Ib.*

37. A sum of money deposited in the Court of chancery, being detained there by appeal, it was, in July 1836, agreed, that by and with the consent of the Chancellor, that *G* and *S* be constituted trustees, to receive and invest such funds; and that upon the final hearing of the appeal, the trustees should pay into the Court of chancery the said sum, and all interest and profit which might accrue thereon, subject to the order and decree which might be passed on said appeal. The money was paid to the trustees, who jointly receipted therefor, loaned *H* a part thereof, which was repaid in about twelve months, and immediately thereafter loaned the same sum to *T*, who amply secured the same by mortgage. The mortgagee paid interest thereon from time to time to *S*, *one* of the trustees; and in 1841, repaid him the entire principal sum, when he released the mortgage. All the payments to *S*, were *without* the knowledge, privity, or consent of *G*, who was also ignorant of the release. The cause, upon appeal, was decided in 1838, but no application was made for a distribution of the fund, by those entitled to it by the decree of the Chancellor and appellate court, until 1843, when a petition was filed, requiring the trustees to account. It then appeared that *S* had misapplied the fund received from *T*. There was no charge of fraud, collusion, or criminal remissness on the part of *G*. HELD: that the loan to *T*, was properly and regularly made, and that *G*, as co-trustee, was not responsible for the money received by *S* from *T*, and misapplied. *Glenn vs. McKim*, 366.

38. If judicial trustees are to be made responsible for the acts of each other, in cases where trustees, by agreement, would not be so, it must be by virtue of a bond, taken for the due performance of their trusts, and where one stipulates for the other. *Ib.*

39. In 1791, *G* conveyed an estate to *W*, in trust, and by way of mortgage, to secure *D* a sum of, &c., then due and owing from *G* to *D*.

COURT OF CHANCERY—*Continued.*

After this, *W* conveyed the same estate to the three children of *G*, who, in 1805, conveyed it to *R*, *executrix of D*, to secure the original debt, and a further sum, with interest These debts were assigned by *R* to *B*. in 1806, and by him to *N*, in 1812. In 1822, *G*, and two of his children, executed a bond to *N*, for the sum of, &c., the mortgage debt. This sum was composed of the two principal debts, with interest added from their dates, after allowing various credits for interest, to the time of the assignment to *B*, in 1806, and then with interest on the aggregate as principal, allowing intermediate credits less than the interest, to the date of the second assignment to *N*, in 1812; at which time the interest was again added to the principal, and interest upon that aggregate to 1822, when the bond to *N*, was given for the whole sum. The bill charged a concurrence of the three children of *G*, in the bond of 1812, and as to the one who did not sign it, there was a decree, *pro confesso*. HELD: that as in 1806, interest had accrued on the mortgage debt, there was no objection to converting it into principal at the time of the assignment to *B*; and as interest had accrued to him, there was no objection in converting it, also, into principal, at the time of the assignment to *N*, and that, therefore, the bond taken in 1822, was not usurious, and was evidence of the debt due under the mortgage, which would not be reduced by excluding the interest, or the interest added to the principal. ***Fitzhugh et al., vs. McPherson, adm'r of Neth***, 408.

40. Upon a creditor's bill, for the payment of a mortgage and other debts, the land of a deceased debtor, was decreed to be sold by a trustee appointed for that object. The trustee made and reported a sale. The funds raised in that mode being insufficient, a contribution was directed to be levied upon the devisees of the debtor, at their request, for the balances due certain specified creditors, which was done, and the accounts stated, both with the trustee and devisees, confirmed. After this, some of the devisees paid their contributions to the trustee, who wasted that part of the funds, and died insolvent. A second trustee was appointed, who collected the balance of the contributions. HELD:—

    1st. That this last balance, was to be distributed rateably among the specified creditors in the contribution account.

    2nd. That the first trustee had no authority, either under the original decree, or the ratified accounts, to receive the same.

    3rd. That the claim of the complainant, who obtained the decree, was not affected by such payment to the trustee, although the trustee was his solicitor. Neither was that of a mortgagee of the land decreed to be sold, though it included that belonging to the contributing devisees. ***Farmers Bank of Maryland vs. Mackall and Tilton***, 447.

41. Equity will not sanction what was done without authority, though it would have ordered it to be done, where it endangers the interests of parties interested in the act. *Ib.*

COURT OF CHANCERY—*Continued.*

See ATTORNEY AT LAW, 1.

DOWER, 1 to 4.

LIMITATION OF ACTIONS, 2, *sec.* 5, 3.

TRUSTS—TRUSTEES.

COVENANT.

1. *M* covenanted with *R and others*, building committee of the *G. R. Congregation*, that he should and would, on or before *the 1st day of, &c., next*, in consideration of, &c., to be paid to him at the times thereinafter specified, well and substantially erect, build, and completely finish, a church for the said congregation, upon the ground belonging to them, according to the specifications and dimensions following, &c. The said *M* further covenanted, that he should do or cause to be done *within said time*, all the work necessary to finish and complete the said church. The committee agreed to pay him a specified sum, when he should give bond for the performance of the work; another sum when the brick wall should be commenced, &c. The parties further covenanted, that in case the building committee should *direct any more work to be done* than is mentioned, then they should pay *M* so much money as such work shall be worth, upon a reasonable valuation. HELD:

   1st. That if an action could be sustained on this covenant for the work done by *M*, then the action of *assumpsit* could not be sustained for the same.

   2nd. That *M* could recover for the extra work, though done after the time stipulated in the covenant, unless the time for the completion of the building, including the extra work, was of the essence of the agreement.

   3rd. That this covenant, in relation to the extra work, is an independent covenant, the parties not designing to restrict the completion of the extra work to the day designated in the contract.

   4th. If the covenant in relation to extra work was a dependent covenant, then if, such work had been required to have been performed the day before that designated for the completion of the church, the plaintiff would have been bound to have performed it, although such performance might have required months.

   5th. That as time in relation to the extra work, where that was required to be done, is not of the essence of the covenant, a suit for it could only be maintained on the covenant.

   6th. That if the agreement had contained no covenant in relation to extra work, its terms would have made the time for the completion of the building of its essence. *Ramsburg et al., vs. McCahan*, 341.

DATE. *See* BOND, 2, 3.

DEBTOR AND CREDITOR.

See ATTACHMENT, 1.

EVIDENCE, 10.

DECREES,

In other States, effect of, *see* COURT OF CHANCERY, 5, 6, 7, 8.

DEEDS.

1. It is of no moment in what part of a patent a binding expression is found, wherever found it must be applied according to its true meaning. *Budd vs. Brooke, et al.*, 198.
2. In giving construction to a patent, the court is bound, as far as possible, to reconcile all its parts, and gratify the full meaning and import of every word. *Ib.*
3. The course of a line is in no case held to interpose any obstacle to the gratification of a conflicting binding call. *Ib.*
4. Deeds are to be most strongly construed against the grantor, for the benefit of the grantee. *Ib.*
5. To render an exemplified copy of a deed admissible in evidence, to prove title to the land which the deed professed to convey, it must appear to have been executed with all the essential forms required to warrant its enrolment under the laws of this State. *Ib.*
6. In 1684, the law required that such a deed should be acknowledged before some of the judicial tribunals or public officers, enumerated in the acts of Assembly, and recorded within one year. *Ib.*
7. The recording of a deed not authorised by act of Assembly, gives it no additional validity, and the record thus made, or the exemplified copy therefrom, is no more evidence of the existence of the deed, than would be a copy of such deed certified by any private individual. *Ib.*
8. None of the various acts prescribing the mode in which conveyances of land are to be made, direct the certificate of the acknowledgment of a deed to be recorded, except that of the acknowledgment of a *feme covert;* yet it has been a uniform custom of all recording officers, to record such acknowledgments, and their authentications of such recording, have, in all the tribunals of the State, been received as sufficient evidence of such acknowledgments. *Ib.*
9. The acts of 1692, ch. 30; 1699, ch. 42; and 1715, ch. 39; only cured such defective conveyances as had been recorded within the year. *Ib.*
10. Where a deed professes to convey part of a parcel of land, called *A*, and in giving its description by course and distance, it has but two straight lines, which can embrace no deed nor any part of a tract, it is not evidence of title or location. *Ib.*
11. The time of recording a deed, is sometimes a matter to be determined by the court, sometimes a question to be submitted to the finding of a jury. *Ib.*
12. If it plainly appears from the endorsement, officially made upon a deed or its exemplification, that it has *not* been recorded within the time prescribed by law; and there is no admissible evidence in contravention of such endorsement, then the admissibility of the deed or its exemplification, in evidence, is determined by the court; but if there be such admissible contravening testimony legally sufficient, then the time of recording, with a hypothetical instruction from the court, will be submitted to the jury. *Ib.*

DEEDS—*Continued.*

13. Where it did not appear by any endorsements on the exemplification of a deed, which had been recorded, whether it had been so recorded in or out of time, it is for the jury to determine whether it was recorded in time, and the court, without any proof upon the point, cannot conclude it was in time. *Ib.*
14. In construing a grant, it is the duty of the court, first, to ascertain what the parties intended should be effected by it. *Ib.*
15. That intention being collected from an inspection of the grant itself, it is the duty of the court to give it such an interpretation as will effectuate it, provided the terms and expressions used in the grant, will admit of such a construction. *Ib.*
16. Where a patent recited that *S*, on behalf of herself and *W* and *R*, infants, by her petition set forth, that *T*, her deceased husband, did theretofore set forth, by his petition, that there was escheat, &c., and being the first discoverer, prayed to be admitted to its purchase, &c., and paid for the same; but, before the said *T* obtained a grant, he died, having devised the aforesaid escheat land to his wife, *S*, during widowhood, and afterwards, to be equally divided between *W* and *R*, and she prayed that a grant might issue, agreeably to the bequest of the said *T*, which was granted to *S*, *W* and *R*, to have and to hold unto the said *S*, *W* and *R*, their heirs and assigns forever. HELD: that the *habendum* in the patent, should not control its premises, which was to vest in the grantees the same estate which they respectively would have taken under the will of *T*. *Ib.*
17. The technical meaning of the word premises, in a deed of conveyance, is everything which precedes the *habendum*, and it is in the premises of a deed that the thing is really granted. *Ib.*
18. The limitation contained in the *habendum* of a deed, where it is in conflict with the estate given in the premises, must be rejected, and that in the premises prevail. *Ib.*
19. A grantor shall not be allowed to contradict or retract, by any subsequent part of a deed, the gift made in the premises. *Ib.*

DEPARTURE IN PLEADING.

See PLEADING, 1, 2, 8.

DESCENT.

See COURT OF CHANCERY, 32, 36.

DEVISE.

See WILL AND TESTAMENT.

DONATION.

See COURT OF CHANCERY, 18.
EVIDENCE, 19, 20, 21.

DOWER.

1. *J*, in the premises of a deed, recited, that he had covenanted, in May 1813, with *M*, to stand seized of land, to the use of *J*, for life, and to and for the use of *M*, his heirs and assigns, forever; and by the same deed it was witnessed, that the said *J* hath given, granted, and enfeoffed the same lands to *M*, his heirs and assigns, to and for the

DOWER—*Continued.*

use of *J*, for life, and after his decease, to and for the use of *M*, his heirs and assigns, forever. The grantee, *M*, mortgaged his estate under this deed, in 1824; and *J*, the covenantor, died in April 1825. *M* applied for relief, under the insolvent debtor's act, in May 1825, several years before which he was married. HELD: that his widow was not entitled, at common law, to dower in these lands. *Miller vs. Stump*, 304.

2. The act of 1818, ch. 193, gives the widow a right to dower in an equitable estate, but that right cannot operate to the prejudice of *H*, the mortgagee of that equity. *Ib.*

3 Where an equitable estate in land is mortgaged, and sells for more money than the mortgage debt, in some cases the widow may be entitled to a portion of the surplus, in lieu of dower; but it is a claim for which a purchaser of the equity is not answerable. *Ib.*

4 Where the land of the ancestor is sold, as incapable of division, and purchased by one of his children, who gives bond for the purchase money, yet never procures a conveyance, the widow of the purchaser cannot be endowed to the prejudice of the other children, lien holders, who have not been paid for their interest in their father's estate. *Ib.*

EJECTMENT.

1. A tract of land described in the patent, as lying on the south side of a creek called *C* creek, beginning at a marked white oak, standing on the west side of a little creek called *St. K's* creek, and running *E. N. E.* up *C* for breadth, the length of, &c., to a marked oak, would not by force of the terms, "*running E. N. E. up the creek*," bind on the creek, for they merely indicate the general direction of the line referred to, and the line must be run from boundary to boundary. *Budd vs. Brooke, et al.*, 198.

2. But where the patent further described the land, which was a tract of four sides, by stating how it was bounded on the *E. S. and W.*, and that it was bounded on the *N.* (where its first line runs,) with *C* creek, this controls the location of the first line, and requires it also to bind on the creek. *Ib.*

3. It is of no moment in what part of a patent a binding expression is found, wherever found it must be applied according to its true meaning. *Ib.*

4. In giving construction to a patent, the court is bound, as far as possible, to reconcile all its parts, and gratify the full meaning and import of every word. *Ib.*

5. The course of a line is in no case held to interpose any obstacle to the gratification of a conflicting binding call. *Ib.*

6 Deeds are to be most strongly construed against the grantor, for the benefit of the grantee. *Ib.*

7. When a tract of land called to begin at a marked tree, thence running up and with a creek two hundred perches, to another marked tree, it should be located to run from the beginning tree, so as to bind on the creek, to the second boundary; but if that boundary cannot

EJECTMENT—*Continued.*

be found on the creek, a line may be supplied, from the end of the two hundred perches on and with the creek, to the second boundary. It would be against our practice to supply a line from such second boundary to the nearest point on the creek. *Ib.*

8. The patent for *W* described it as lying on the *S.* side of a creek, beginning at a marked oak by the creek side, and running *S. W.* down the creek for breadth, the length of one hundred perches to a marked oak, standing upon a point at the mouth of the said creek; bounding on the *S.* by a line, &c. drawn *S. E.* into the woods three hundred and twenty perches, to a bounded oak; on the *E.* by a line, &c. drawn *N. E.* from the end of the former line to a bounded hickory, that intersects a parrallel line drawn *N. W.*, to the first marked oak on the *N.*, with the said parrallel on the *W. with the said creek.* HELD:
9. The first line of *W* binds on the creek. *Ib.*
10. The second boundary of *W* being lost, and the spot where it stood being incapable of identification, if the creek had not been called for, the first line must be run from the beginning by its course and distance, the best means left of ascertaining its true location and terminus. *Ib.*
11. The description, "standing upon a point at the mouth of a creek," is too vague and indefinite to control the positive expressions of the patent as to course and distance; and is not of itself sufficient evidence of its locality. *Ib.*
12. Certainty is the controlling object in all locations. *Ib.*
13. A binding call for a creek, and also for a marked tree having relation to a line of a tract of land, changes the general rule, that the line calling for a lost boundary must be run by course and distance. *Ib.*
14. Where there are two imperative calls, both, if practicable, must be gratified. *Ib.*
15. Where there were two calls, one for a line to bind on a creek, and the other to terminate at a marked tree, if the latter cannot be found, nor its spot identified, the distance must be expended on the creek, and no interpolated line can be supplied. *Ib.*
16. Proof that a point shown on the plots was the outermost and most prominent point at the mouth of the creek, and the first point reached in running the first line of *W*, with a general description of such point, is not evidence tending to prove that the marked oak once stood there. *Ib.*
17. The variation of the compass has no application to a line which must be run according to the calls in the patent, which are to be gratified in the same manner, as if no course for the line were expressed in the patent. *Ib.*
18. Where defence is taken on warrant of resurvey, an ancient plot, to be given in evidence, must be correctly located under the warrant, upon the plots prepared for the trial of the cause. Where it is so unintelligibly represented upon such plots and the explanations, as that it was almost impossible for either the court or jury to say

EJECTMENT——*Continued.*

whether the locations on the plot offered in evidence, were truly located on the plots in the cause or not, such ancient plot cannot be used as proof. *Ib.*

19. In ejectment, the plaintiff declared for a tract of land called "*Nonesuch*," and professed to locate it according to its patent. There was no location of it as a parcel of land, made up of other tracts, which had acquired a name by reputation; under such circumstances the plaintiff would not be permitted to prove, that "*Nonesuch*" was known by its reputed name as comprising such other parcels, though these were located, for the defendant could not have had any opportunity to counterlocate it by its acquired or reputed character. *Ib.*

20. Whether lands may be declared for, or recovered by their reputed name, *qr.* *Ib.*

ELECTION.

See COURT OF CHANCERY, 32, 36.

EQUITY.

See COURT OF CHANCERY.

EQUITABLE PLAINTIFF.

See ASSIGNMENT.

ERASURE.

See BOND, 2, 3.

ESTATE TAIL.

See WILL AND TESTAMENT, 18 to 21.

ESTOPPEL.

See EVIDENCE, 20, 21.

EVIDENCE.

1. *B* authorized *G* to purchase certain personal property of *M*, put up by him on a fishery of *B's;* in case they could not agree, to call in a third person, as to the price; and whatever they agreed, he, *B*, would pay, but said, "recollect that when my claim for damages and rent is settled, whatever remains I will pay it." This was communicated to *M*, who said, "I am perfectly satisfied to leave it to men, but I have done *B* no damage; I owe him some rent, which I have been always ready to pay him." Arbitrators were selected, who awarded, that *M* should "receive the sum of $1000 for the following property, to wit: The houses, sheds, with all the apparatus thereto affixed with nails; also all loose plank over, &c.," and repairs on *Stony Point Shore*, with repairs on wagon house. On this award *G* and *M* endorsed, "we do agree to abide by the within appraisement." In an action to recover the amount of the award, *B* offered evidence that the claim thereon was compromised, and released by an arrangement in relation to certain actions theretofore pending in *Virginia*, by *B* against *M;* and for the purpose of inducing the jury to believe such arrangement, proved that *M* had cut upon the premises devised to him by *B's* father, wood to the

EVIDENCE—*Continued.*

value of $2000. Such proof being offered without objection, *M*, to rebut it, *proposed to prove* that the rented property was greatly improved by him by his course of farming. HELD: that this testimony was not admissible as an answer to the alleged trespass. *Bullitt vs. Musgrave*, 31.

2. Whether the land had been well tilled or not, or had been cultivated so as to benefit the defendant, were not questions in issue before the jury. *Ib.*

3. On the 20th September 1839, the *Marine Bank* issued their certificate of deposite, payable to *S* or order. It was mailed for *St. Louis*, and an endorsement by *S*, forged, when it was passed to *B* of *Illinois*, for value, *bona fide;* that house remitted it to *H* of *New York*, who remitted it to *W* of *Baltimore*, customers of, who deposited it with the *Merchants Bank* for collection, and obtained a credit for it in account, on the 2nd November. On the 4th, the *Marine Bank* paid it to the *Merchants Bank*. On the 21st, the former institution discovered the forgery, immediately gave notice to the latter bank, and demanded its payment. Between the 2nd and 18th November, *W* had always to his credit with the *Merchants Bank*, a larger sum than the amount of the certificate. On the 19th it was less, but on the 20th, 21st and 22nd, it was again greater. There were daily transactions, deposites and checks, by *W*, with and on the *Merchants Bank*. The *Marine Bank* having paid the certificate to the real payee, brought an action against the other bank, which it had also paid previously, to recover back the amount of the certificate. HELD:

2nd. There was evidence, that on the day on which the forgery was discovered, and the demand made on the defendants to refund the money, that there was standing to the credit of *W*, on the books of the *Merchants Bank*, a larger sum than the amount of the certificate. *Ib.*

4th. The credit to *W* on the books of the bank for the amount of the certificate was not conclusive, and did not prevent the bank from correcting the account when the forgery was discovered; if it then had funds in their possession adequate to that purpose, the credit was only *prima facie* evidence. *Merchants Bank vs. Marine Bank*, 96.

4. The cashier of a bank possesses no incidental authority to make any declarations binding the bank, not within the scope of his ordinary duties. *Ib.*

5. An agreement of facts made, and filed in a cause prior to its first trial, which after judgment was reversed upon appeal, is competent evidence upon a second trial, under a *procedendo*. *Ib.*

6. Where a father, in 1798, knew that his daughter had entered into an engagement of marriage, of which he approved, and being a man of fortune, declared it to be proper and just that he should make an advancement, in contemplation of marriage, to her, as he had

EVIDENCE—*Continued.*

done to another daughter; and accordingly, a short time before her marriage, announced his determination to give her a house, and in fact did verbally give it to her in fee, as a marriage portion. It appeared also, that the house was prepared for his daughter, and she placed in possession of it by her father, as her own property; that these arrangements were known to the intended husband, and the marriage there celebrated; that the parties there resided for some months, and from that period, the daughter, to the time of her death, in 1806, was in the enjoyment, under the gift, of the rents of the property, with the knowledge and consent of her father; sometimes paid to her by him, and sometimes by his agent. HELD: that these circumstances constitute a mass of proof upon the *factum* of the gift, which it is impossible to resist. *Dugan et al., vs. Gittings et al.*, 138.

7. By the act of 1798, ch. 24, sec. 29, "No vestry can sell a lien, or transfer any of their estates or property belonging to the church, without the consent, at least, of five of their body,"—rector, church wardens, and bishop of the *P. E. Church*. The assent of vestrymen, to a decree for the sale of church property, in this case must be regarded as implied admission, that the debt claimed was due, as they have no power to make a voluntary sale of the property. *Allender et al., vs. Vestry of Trinity Church*, 166.
8. A notice entitled in another cause to produce books in evidence, merely filed in this, without proof of service, raises no inference against the party to whom the notice is addressed. *Ib.*
9. Primary proof in equity, stands in the place of full proof, until full proof is demanded. Such a demand dispenses with and invalidates primary proof. *Ib.*
10. It is a settled rule of evidence, that if a debtor defendant, seeking to discharge himself from a claim preferred against him, relies on the entries on the credit side of the account, rendered or exhibited by his creditor, he thereby admits in evidence against him, the entries on the debit side of the account; and such debits not being discredited, nor disproved by testimony in the cause, establish the claim according to the account. *Ib.*
11. In a controversy upon an account for work and labor, materials furnished, and money paid, after a lapse of twenty-four years, suit commenced, general proof of the nature and extent of the demand being in evidence, and free from suspicion, much less detailed proof should be exacted from the claimant; than if, immediately after its origin, a controversy in relation to it had arisen. *Ib.*
12. Signatures to receipts for money paid, being in the possession of the party and his representatives claiming under him, for more than thirty years, need not be proved. They are presumed to be genuine, when they relate to transactions, which are established as having occurred in conformity to the receipts, by general and collateral proof. *Ib.*
13. Evidence should correspond with the allegations of the declaration, or be confined to the point in issue. *Turner vs. Maddox*, 190.

EVIDENCE—*Continued.*

14. In an action by an executor to recover back money alleged to have been paid by his testatrix in her life time, he cannot show a payment by himself after her death. *Ib.*

15. Where an objection is made to the admissibility of evidence in mass, without specification, if any part of it is admissible for the purpose for which it was offered, it is not error in the court to overrule the objection. *Budd vs. Brooke et al.*, 198.

16 Where an entire prayer is good in part, and bad in part, the court is not bound to perform the duty of counsel, analyze the subject matter of the prayer, admit a part, and reject the residue; but may content itself, in granting, or rejecting the same, according to its merits, as presented in its entirety. *Ib.*

17. The general rule is, that a party to the record cannot be examined as a witness; but upon a motion to strike out the use to which a suit or judgment has been entered, the legal plaintiff may be examined to prove the consideration of the assignment. The contest is solely between the defendant and the *cestui que use*, and the witness is not liable for the costs of the motion. *Baldwin vs. Wright & Kent*, 241.

18. The plaintiff declared for sundry matters and things, properly chargeable in account, as per account filed, and for money paid, &c. At the trial of the cause, under the general issue, he abandoned his account. HELD: that under the money count, he might give evidence of money paid, not included in the account filed. *Carter vs. Tuck*, 248.

19. In an action of replevin for negroes, upon the plea of property in the plaintiff, it appeared, in the proof of the plaintiff, that the defendant had paid him the sum of twenty-five cents for hire, on several occasions, for one of the negroes, and declared she would do so as long as the plaintiff would suffer her to keep possession, and admitted she had received clothing from the plaintiff, for the children, which he had purchased, in her presence, for them; that the defendant had enquired of the plaintiff, whether he would agree to sell the negroes, and the plaintiff refused to sell them. The plaintiff also offered proof of an agreement between him and the defendant, that the plaintiff was to clothe the children, and the defendant to pay hire for them, until the plaintiff thought proper to take the mother and children home. The defendant proved, that the slaves were born in her possession, and so continued up to the institution of this action; that the plaintiff married her daughter; that when he demanded possession of the negroes, before he brought his action, he refused to state how he claimed them; the defendant stated to the plaintiff how she had given them to her daughter, conditionally, to which he made no reply. HELD, there were facts in the proof from which the jury might infer, that the plaintiff had acquired title to the negroes, otherwise than by gift; that if the jury found his claim to be in pursuance of a gift from his mother-in-law, an express delivery and transfer of the use and possession was indispensable under the act of 1763, ch. 13. *Isaac vs. Williams*, 278.

EVIDENCE—*Continued.*

20. If the plaintiff's title did not flow from a gift, then evidence of a witness who saw the delivery, was not necessary; the delivery, like other facts, may be proved by inferential testimony, *Ib.*

21. In a controversy between two parties, one claiming certain negroes as purchased from the other, the proof on one side consisting of facts from which a sale might be inferred—the other resisting the claim, as owner, who only designed to make a conditional gift,—the admissions of the latter, from which a sale might be inferred, will not estop her from showing the true nature and character of her right. *Ib.*

22. The principal in a guardian's bond called on *V*, and asked him to become one of his sureties in such bond, and stated at the same time, that the defendant would become the other surety. The minutes of the Orphans court showed, that the court would approve, as sureties, the defendant and *J;* and on the face of said minutes it appeared, that the name of *V* had been erased therefrom, and that of *J* substituted. HELD: there was no evidence that the defendant signed the bond, under the impression and with the understanding, that *V* was to be his co-surety; nor that the minutes were known to defendant; nor any misrepresentation made to him, as to the person who was to be his co-security. *State, use Firey, vs. Miller*, 335.

23. *B* sold *M* a parcel of land, executed a deed of bargain and sale therefor, and put him in possession. The deed contained a receipt for the purchase money. The proof showed, that *M*, at time of sale, paid part of purchase money. Shortly after, paid another part, and gave his promissory note for the balance; before the note fell due, the vendee took up the note, by his own order on *F*, for the like sum. This order *F* refused to pay, and upon the fact of the refusal being communicated to *M*, he asked *B* to hold on to the order, that *F* must pay it. In an action of *assumpsit*, to recover the unpaid part of the purchase money; HELD: That the evidence was sufficient, in point of law, to go to the jury, to rebut the *prima facie* evidence of the payment of the purchase money, created by the receipt and release in the deed; and that payment or non-payment of the purchase money, was, in this case, exclusively for the jury. *Morgan vs. Bitzenberger*, 350.

23. In an action of *assumpsit*, the plaintiffs proved, that they and defendant were partners; that in *April* 1841, the defendant told the witness, that two or three days before, they had dissolved partnership. In March 1841, there was a balance of cash to the credit of the firm; and in June of that year, it was drawn out by the defendant, he urging, as a reason why he drew it out, that if the plaintiffs got it, he did not know whether he could ever get any of it again; the plaintiffs further proved, that in August 1842, the defendant stated the balance of the money in bank, in March 1841, belonged to the plaintiffs, and he had drawn the sum of, &c., thereout, by check. The defendant offered no proof; HELD:

EVIDENCE—*Continued.*

1st. That a prayer by the defendant, to instruct the jury, that the evidence was not sufficient to enable the plaintiffs to recover, admitted, as proof, all the facts sworn to, and all rational inferences deducible from such facts.

2nd. That the proof did not tend to prove a promise from the defendant, to pay the plaintiffs any sum. *Riarl vs. Wilhelm*, 356.

24. If the claim be for money, there must be a promise to pay an ascertained sum. *Ib.*

25. It is not necessary that a witness should testify to a positive promise. As in other cases, so in this, what is sufficient proof, is a question for the jury, and the fact may be established by circumstances, and just and fair inferences from facts, as well as by positive testimony. *Ib.*

26. But, in this case, where two, of three partners, are jointly suing the third, before it can be established, that he had made himself responsible to them, there should be proof of some fact going to show, that they had, *inter se*, entered into a new agreement. *Ib.*

27. *C* sued out an attachment against the goods of *J*, which was returned, attached as per schedule. At the return term, *L* appeared, claimed the goods, and pleaded, they were not the property of *J*, on which issue was joined. It was the only issue in the cause. At the trial, *L* offered *J*, who had previously been discharged under the bankrupt law of the *United States*, as a witness, to disprove the property in himself. HELD, that he was competent. *Lizardi, et al., vs. Cohen, et al.*, 430.

28. The witness was not responsible for the costs of the suit; and, in upholding the title of the claimants, was testifying against his own interest. *Ib.*

29. A defendant, in an attachment cause, returned *non est*, being called by a claimant, as a witness, to prove that the property attached did not belong to the witness, who made no objection to being sworn, not liable for costs, nor interested in the event of the suit, even if he was to be regarded as a party to the record, that fact would not disqualify him as a witness. *Ib.*

30. The general rule is, that a party to the record, is not a competent witness, for he is generally, either interested in the object of the suit, or responsible for costs. *Ib.*

31. The form in which this rule of exclusion has been stated by the courts, presupposes that it is subject to exceptions; and when it appears, that the party proposed to be examined, is not responsible for the costs of the suit, and has no interest in the subject of dispute, and is willing to be sworn, he is not within the operation of the general rule. *Ib.*

32. It is a general rule of evidence, that the acts and admissions of a party on the record, are evidence, although he be but trustee for another; but this rule is not without exceptions. *Dent, adm'x, vs. Dent*, 482.

33. In an action against an administratrix, her admissions made before letters of administration had been granted to her, are not competent to

EVIDENCE—*Continued.*

charge her intestate's estate. They were destitute of an essential requisite, viz., interest in the subject matter to which they related, at the time they were made. *Ib.*

34. Courts of law will incidentally enquire into the validity of the judgments of special jurisdictions, whenever such enquiry becomes necessary in the exercise of their ordinary powers. *Moreland vs. Bowling*, 500.

See ARBITRATION AND AWARD, 3.

DEEDS—as to exemplifications of deeds recorded—mode of acknowledgment—time of recording—effect of, on title—effect of clerk's endorsement.

PRACTICE IN CHANCERY, 2, 3,—10, 11,—17, 18.

STAMPS.

WILL AND TESTAMENT, 16, 17.

EXCEPTIONS IN EQUITY.

See PRACTICE IN CHANCERY.

EXECUTION.

1. Where a defendant in a judgment moves to quash a *ca. sa.* issued against him, upon the ground that he had attached the debt due by him to the plaintiff in his own hands, he ought to show that the attachment was regularly levied in his hands. *Baldwin, use, &c., vs. Wright and Kent*, 241.
2. An actual attachment laid by the defendant in his own hands, would be decisive against his liability to be taken in execution for the same debt, and the pendency of the attachment would furnish a ground for quashing the *ca. sa.* until it be decided. *Ib.*
3. The process of attachment on judgment, under the act of 1715, ch. 40, sec. 7, is considered as an execution, and governed by the same principles. *Ib.*
4. An alias attachment cannot be sued out before the first is returned. The second writ is grounded on the first, and the return thereof. *Ib.*
5. It cannot be assumed from the neglect or failure of a sheriff to return an attachment, that there has been no service of it, and unless such fact was made to appear to the court, it would not be justified in issuing a second attachment. *Ib.*
6. Where the return of a sheriff is not made to the term at which the process is returnable, but after the actual sittings of the court were over, at a day in vacation, parties objecting to it, are not bound to move until the next term. *Moreland vs. Bowling*, 500.
7. A sheriff may retain a *fi. fa.* in his hands, after a levy, and after an ineffectual effort to sell, not only until the return day has passed, but until several terms have passed, and may then sell. *Ib.*
8. It is at the option of the plaintiff to rule a return of the *fi. fa.* and issue a *vendi. exponas;* or to allow the sheriff to continue to act under the *fi. fa.* *Ib.*
9. On a motion to set aside a sale returned under a *fi. fa.*, it is the necessary and uniform practice, to examine into all the facts by parol or other proof, and not regard technical estoppels. *Ib.*

EXECUTION—*Continued.*

10. The act of 1816, chap. 129, is express, that notice of a sale under a *fi. fa.*, should be set up at two or more public places in the county, besides the court house, and upon failure to give such notice, the sale will be set aside, on motion made in due time when the writ is returned. *Ib.*

See PRACTICE, 12 to 18.

EXECUTORS AND ADMINISTRATORS.

1. Where a testator devised his estate to his children, share and share alike, but declared, that if his son should elect to carry on the business in which the father was then engaged, he should have for that object his entire estate, and in that event, pay his brothers and sisters, at a valuation which the will directed to be made; and the son so elected, and took the estate, all the debts being paid, the testamentary bond of the executor is discharged. *Ellicott vs. Early and Ellicott*, 439.

2. In an action against an administratrix, her admissions made before letters of administration had been granted to her, are not competent to charge her intestate's estate. They were destitute of an essential requisite, viz., interest in the subject matter to which they related, at the time they were made. *Dent, adm'x, vs. Dent*, 482.

See COURT OF CHANCERY, 31.
LIMITATION OF ACTIONS, 7.

FEE SIMPLE.

See WILL AND TESTAMENT, 18 to 21.

FIERI FACIAS. *See* EXECUTION.

FORGERY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.
BOND, 2, 3.

FRAUD.

1. In an action by an administrator, to recover the value of goods sold and delivered by him, where the issues were made up on the pleas of *non assumpsit*, and payment, the defendant proved the admission of the plaintiff to the defendant, that there was no necessity for the defendant giving his notes for the articles purchased, as he, the plaintiff, would give the defendant credit for the amount, on a judgment due from the plaintiff's intestate to the defendant. There was no evidence that the defendant consented to the arrangement. HELD, no defence to the action. The plaintiff then proved, that the judgment in question had been assigned by the defendant prior to the sale; HELD, that if the plaintiff was ignorant of the assignment, at the time of his admission, and if the defendant, at the same time, concealed the fact of such assignment from him, it was a fraud on the plaintiff. *McKee vs. Baden*, 237.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.
BOND, 2, 3.

GARNISHEE.

See ATTACHMENT TO COMPEL APPEARANCE.

GRANTS.

See DEEDS.

GUARANTY.

1. In an action upon a contract to indemnify one from the consequences of a judgment to be rendered in a pending suit, and which suit was referred under the act of 1785, and during the reference, the person to be indemnified died, the defendant, the guarantor, cannot impeach the validity of such judgment by showing the death of the defendant therein, before it was rendered upon the award. *Turner vs. Maddox*, 190.

GUARDIAN AND WARD.

1. By the act of 1798, ch. 101, sub. ch. 12, sec. 1, guardian's bonds are placed, in all respects, on the same footing with bonds given by executors and administrators; and by the act of 1829, ch. 24, sec. 1, limitations begin to run from the passing of such bonds. *State, use of Firey, vs. Miller*, 335.

HABENDUM AND PREMISES.

See DEED, 16, 17, 18, 19, as to effect of, when contradictory.

HEIR AT LAW.

See COURT OF CHANCERY, 32, 36.

HUSBAND AND WIFE.

See MARRIAGE CONTRACT.

INDEFINITE FAILURE OF ISSUE.

See WILL AND TESTAMENT, 18 to 21.

INJUNCTION.

1. Where the consideration of a contract of sale wholly fails, the vendor, nor his assignees who stand in his stead, ought not to be allowed to recover the purchase money, and a judgment on a bond for it will be perpetually enjoined. *Buchanan et al., vs. Lorman, et al.*, 51.
2. When the person of the defendant is in *Maryland*, though the land in controversy is in *Virginia*, and the object is to vacate a decree of a court of the latter State, though this cannot be done, yet the defendant seeking to enforce such decree, may be enjoined from accepting a conveyance of lands purchased by him under it, or if he has obtained title inequitably, may be decreed to reconvey the same. *Ib.*

INSOLVENT DEBTOR.

See BANKRUPT.

INSTRUCTIONS TO JURY.

See PRACTICE.

INSURANCE.

1. Where there is a formal defect in the preliminary proofs offered by an assured to the underwriter, which could have been supplied had an objection been made by the underwriters to payment on that ground, but the underwriter put his refusal to pay on other grounds, the production of further preliminary proofs will be considered as waived. *Edwards vs. The Baltimore Fire Ins. Co.*, 176.

INSURANCE—*Continued.*

2. Where the answer of the underwriter stated, that the proofs were wholly unsatisfactory as to the amount of the loss; that all responsibility was denied by reason of a material concealment as to the character of the risk; that all claim had been forfeited under a particular article of the policy, and he also reserved all objections to recovery in any form, and without intending to waive any of the rights under the policy, this is not a waiver that the notice of the loss by fire was not "*forthwith*" given, and a particular account of the loss or damage, "*as soon after as possible*," delivered by the assured to the assurers, in conformity to the article in the policy, under which the claim was alleged to be forfeited. *Ib.*
3. The loss took place in November, and the objection was made in March; notice given, or an account of loss delivered, in March, would not have been a compliance with the policy. *Ib.*
4. There is no ground for the implication of a waiver of preliminary proof, where the assured could not have supplied the proof, nor remove the objection to the want of it, if the objection had been made. The assured, in such case, can sustain no injury by non-disclosure: He is not lulled into false security, nor prejudiced in the way of fraud or surprize. *Ib.*
5. Neither will the court imply a waiver, where the answer of the underwriter gives explicit warning and annunciation to the assured, that he designs to waive nothing, and that he must come to trial, fully prepared to prove every thing necessary to his recovery. *Ib.*
6. The terms, "*forthwith*," in a policy of insurance, used in connection with giving notice to the underwriter of the occurrence of a loss by fire—and "*as soon as possible*" after a fire occurs, deliver a particular account of such loss, are not to be taken literally, but mean with due diligence, or without unnecessary procrastination or delay, under all the circumstances of the case. *Ib.*
7. In all ordinary cases, whether due diligence has been used by the assured; or he has been guilty of no unnecessary procrastination or delay, under all the circumstances of such cases, are questions of fact, to be determined by the jury. *Ib.*
8. It is not analogous to the question of diligence exacted by the law, from the holder of a dishonored note or bill, desirous of fixing the liability of previous parties to such instruments. *Ib.*
9. A policy of insurance, executed in *Baltimore*, against fire on merchandise in a house at *F*, required the assured *forthwith*, to give notice to the underwriter of any loss. The mail left *F* on Monday, Wednesday, and Friday, for *Baltimore*. The fire took place on *Friday* night, and the assured did not give notice by mail on Wednesday. All the circumstances attending the condition of the property, and the efforts of the assured to collect, and preserve it in its damaged state were left to the jury to determine, whether the assured was not so occupied on *Tuesday*, in doing every thing in his power for the safety and protection of the property, as to show, he had neither time nor opportunity to put the notice in the post office, in season for the mail of that day. *Ib.*

INSURANCE—*Continued.*

10. Where a vessel insured was, by one of the perils insured against, so far damaged, that under all the circumstances attending her situation consequent on said injury, it was necessary, *in the opinion of the jury*, for the interest of all concerned, that she should be sold, and that under such necessity, she was, in good faith, sold by order of a court of admiralty, decreeing salvage, the assured is entitled to recover for a total loss, although the jury may find, or the court be of opinion, that there was no valid abandonment by him. *Mutual Safety Ins. Co. vs. Cohen*, 45.

11. If there be an urgent necessity for the sale of an insured vessel, damaged by the perils of the sea, the master, as agent, both of the insured and underwriter, has a right to sell the vessel, and such sale constitutes a total loss, for which the underwriters are responsible; and if the jury find such necessity, there is no obligation on the part of the assured to abandon. *Ib.*

INTEREST.

1. Where interest has once accrued, it becomes a debt, and there is no longer any objection to an agreement *inter partes*, that it shall be considered principal, and carry interest. *Fitzhugh et al., vs. McPherson, adm'r of Neth*, 408.

See COURT OF CHANCERY, 10.

INTERLOCUTORY ORDERS.

See PRACTICE IN COURT OF APPEALS, 8, 9, 10.

JUDGMENT.

1. In an action upon a contract to indemnify one from the consequences of a judgment to be rendered in a pending suit, and which suit was referred under the act of 1785, and during the reference, the person to be indemnified died, the defendant, the guarantor, cannot impeach the validity of such judgment by showing the death of the defendant therein, before it was rendered upon the award. *Turner vs. Maddox*, 190.

2. Where a plaintiff assigned a judgment before process of attachment was sued out against him by one of his creditors, the attaching creditor, though defendant in the judgment, can obtain no lien under his attachment to defeat the assignee. *Baldwin vs. Wright and Kent*, 241.

3. Courts of law will incidentally enquire into the validity of the judgments of special jurisdictions, whenever such enquiry becomes necessary in the exercise of their ordinary powers. *Savage Man. Co. vs. Owings*, 497.

See COURT OF CHANCERY, 6.

JURISDICTION.

1. Under the 4th sec. of the act of 1835, ch. 201, in cases of contract, a verdict under one hundred dollars, will not sustain the jurisdiction of the county court. *Carter vs. Tuck*, 248.

2. An executor who had paid specific legatees, discovering a deficiency of assets to pay creditors, and a consequent overpayment to lega-

JURISDICTION—*Continued.*

tees, cannot maintain an action at law to recover back such overpayment from a particular legatee. A court of law cannot take into consideration, as a court of equity would do, the mode in which the funds might have been applied. *Somervell vs. Somervell*, 276.

3. The jurisdiction of the county courts, in opening roads, is not exercised by virtue of its general powers as a court of common law, but by virtue of a special delegation of power. *Savage Man. Co. vs. Owings*, 497.

See ATTACHMENT TO COMPEL APPEARANCE, 3.
PRACTICE, 12 to 18.
PRINCIPAL AND SURETY, 3.

JUSTICES OF THE PEACE.

See BOND, 1.
PRACTICE, 12 to 18.

LESSOR—LESSEE—LEASE.

1. A lessee cannot set up any claim for voluntarily farming land in a more beneficial manner than the lease required. *Bullitt vs. Musgrave*, 31.
2. When a tenant has been guilty of a trespass in committing waste upon the demised premises, evidence of better than ordinary cultivation of the same cannot have any tendency to diminish or mitigate a claim for damages for such waste. *Ib.*

See STAMPS.

LEX—LOCI.

See BANKRUPT, 1.
BILLS OF EXCHANGE, 8.

LIEN.

1. Where a creditor has a lien on a specific fund, an agreement to make no claim against one of two principals in a debt, on the express condition, that he shall retain the lien, will not defeat his remedy against the fund. *Cross et al., vs. Cohen*, 257.
2. The design of the acts of 1832, 1834, 1839, was to continue to the creditor, who has been obliged to have recourse to this process, the lien, which, by the service of the attachment, he had on the property attached, unless the debtor will give other and better security than that which is afforded by giving bail. *Barr vs. Perry*, 314.

See COURT OF CHANCERY, 20, 27, 28, 29, 30.
DOWER, 1 to 4.

LIMITATION OF ACTIONS.

1. *D*, the father, in 1798, made a parol gift of real property to his daughter, as a marriage endowment, and delivered her possession. Her husband in 1801, became a bankrupt, and assigned all his property to *D*. In 1806, the daughter died, leaving three infant children. In 1818, the husband died. To the period of the husband's death, *D* must be regarded as occupying the property in the character of assignee of the husband, and then, for the first time, the statute of limitations was put in motion by his adverse claim. *Dugan et al., vs. Gittings et al.*, 138.

LIMITATION OF ACTIONS—*Continued.*

2. In the year 1820, one of the daughters came of age, and married in 1821. In 1822, another daughter married, and came of age in 1825. The son died unmarried. The bill was filed in 1837, before the lapse of twenty years from the death of the complainant's father, the bankrupt, to procure a conveyance of the house and lot, and an account and payment of the rents received by *D*, since the death of their mother, in 1806, against the heirs and devisees, and executrix of *D*. HELD, that in the application of the statute of limitations:
   1. That as to the daughter who married before she came of age, it was not competent for her to avail herself of any other disability than that of infancy, the disability which existed at the time her cause of action accrued.
   2. A party is protected by the disability which exists at the time his right of action *first* accrued, because the case is within the express terms of the statute.
   3. If there are in existence several disabilities, at the time the right of action accrues, the statute does not begin to run until the party has survived them all. *Ib.*
   4. The operation of the statute cannot be prevented by cumulative disabilities. If subsequent disabilities were to be regarded, the right of action might be saved for centuries. *Ib.*
   5. A court of equity, in applying the statute of limitations analogically, would not permit the claim of a party to real property to be affected by any devolution of time short of that which would have barred him at law in an action of ejectment. *Ib.*
   6. If the parties, complainants here, could have recovered their rents from *D*, in an action of *indebitatus assumpsit*, or it was a case of concurrent jurisdiction, at law or in equity, then the act of limitations, in relation to personal actions, would have been a bar after three years. *Ib.*
   7. The rents and profits in this case could not have been recovered at law, they would be payable only upon the successful assertion of title to the property, and as the contract resting in parol would have been void at law, no recovery in that court could have been obtained; the doctrine of part performance is peculiar to the chancery courts, and is not regarded at law, as taking a case out of the statute of frauds. Hence limitations are no bar to the recovery of rents and profits in equity, under the circumstances of this case. *Ib.*
3. In 1807, *G* conveyed to *S and others*, two lots, on which a church had then lately been erected, in trust, that the grantees upon being reimbursed all sums which have been, or may hereafter be paid and applied in and about the building of such church, release to such person or persons as shall or may be legally authorised to receive the same, all their estate in, &c., in trust for the said church. *A*, the surviving grantee, laid out a large sum upon the building, and devised the

LIMITATION OF ACTIONS—*Continued.*

debt to the appellants, who, in 1837, filed a bill to sell the lots for repayment of their claim, against the vestrymen of the church: no person had been authorised to receive a release from the grantees. The vestrymen answered the bill, assented to a sale, but disclaimed knowledge of the amount of *A*'s expenditures. HELD:

1. The act of limitations was not a bar.
3. The non-appointment of persons to receive a release, could only be accounted for by imparting to the vestry a knowledge of the fact, that the building of the church had not been paid for.
5. The assent of the appellees was a waiver of the objection, that the claim was a stale one, and abandoned by lapse of time. *Allender et al., vs. Vestry Trinity Church*, 166.

4. Where one and the same person is both *cestui que trust* and trustee, and the right to recover rests on a mere equitable implication of a lien, not recognised at law, and there is no adverse or uninterrupted possession relied on in bar, the act of limitations constitutes no defence. *Ib.*
5. To entitle a party to the benefit of the act of limitations, the claim must be such that, if exempted from that plea, it could be recovered by an action in a court of law. *Ib.*
6. The act of limitations to be available, must either be relied on by plea or answer. *Ib.*
7. By the act of 1798, ch. 101, sub. ch. 12, sec. 1, guardian's bonds are placed, in all respects, on the same footing with bonds given by executors and administrators; and by the act of 1829, ch. 24, sec. 1, limitations begin to run from the passing of such bonds. *State, use of Firey, vs. Miller*, 335.

See PLEADING, 9.

LIMITATIONS OF REAL PROPERTY.

See DEED, 16.

WILL AND TESTAMENT, 5 to 10,—14, 15,—18 to 21.

MARRIAGE CONTRACT.

1. An agreement made by a father with his daughter, in contemplation of her marriage, by way of advancement, and as a marriage endowment, followed by her marriage as then contemplated, has for its support a valuable consideration. It cannot be revoked by the father. The marriage is a consideration which vests the interest in the donee against all the world. The daughter is regarded as a purchaser, as much so, as if she had paid for the property an adequate pecuniary consideration. *Dugan et al., vs. Gittings et al.*, 138.
2. The delivery of the property by the father to the daughter, under such circumstances, in pursuance of the gift and fulfilment of the condition on which it was to attach, withdraws the contract from the reach of the statute of frauds. *Ib.*
3. Where a father made a parol gift of real property to a child, in contemplation of marriage, and executed the same by delivery of possession, the court will not infer, that subsequently, another piece of

MARRIAGE CONTRACT—*Continued.*

property was substituted by consent, the conduct of the father to the time of his child's death, and after the period when the alleged substitution was supposed to have been made, being entirely inconsistent with the existence of such consent. *Ib.*

MAYOR AND CITY COUNCIL OF BALTIMORE.

1. Taxes levied for the city of *Baltimore*, on real estate, prior to 1840, ch. 63, are not liens on the land, where there is a sufficiency of personal property on the premises taxed, to pay the same. *Dallam et al., vs. Oliver's Exc'rs*, 445.

2. The act of 1840, chap. 163, which authorised the city of *Baltimore* to provide, by ordinance, for the prompt collection of taxes due the city, and to that end, may and shall have power to sell real, as well as personal property, will not be so construed, as to have a retrospective effect. *Ib.*

MERGER.

See BILLS OF EXCHANGE, &c., 5, 6, 7.

MONEY HAD AND RECEIVED.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

MORTGAGE—MORTGAGOR—MORTGAGEE.

1. Under the act of 1844, ch. 280, a mortgage, without a covenant to pay the debt secured; a lease on which is reserved a rent in money, or in specifics; an assignment of property, in consideration of an annuity, to be paid by the grantee for the life of the grantor; an order or draft not sold, nor intended to be put into circulation, but made solely to obtain possession by the party of his own funds, are not required to be stamped. *Burton, et al., vs. The State*, 1.

2. A mortgage with a covenant, to pay the debt secured; a due bill, or written acknowledgment of indebtedness to a certain extent; an account stated, signed by the parties, or by the party to be charged, as evidence of debt, are required to be stamped. *Ib.*

See COURT OF CHANCERY, 4, 39.
DOWER, 1 to 3.
TRUST—TRUSTEE, 8, 9.

NOTICE.

See COURT OF CHANCERY, 17.
EVIDENCE, 8.
EXECUTION, 9.

OR, CONSTRUED, AND.

See WILL AND TESTAMENT, 19.

PARTNERSHIP.

1. The ground on which partners, after a dissolution, can sue each other, in relation to what had been partnership funds or effects, is, that the joint interest as partners having ceased, a new contract had been made between the parties, in their individual, as distinct from their partnership characters. *Riarl vs, Wilhelm*, 356.

PARTNERSHIP—*Continued.*

2. The joint interest can only be terminated by an agreement, vesting a separate title or interest in the thing, to which, before that time, there had been a joint title, and the rule equally applies to money, as to choses in action. *Ib.*
3. Property which belonged to *three* partners, cannot become the separate property of *two* of them, except by an express agreement to that effect. *Ib.*
4. In every case in which property has been held by partners, it is necessary, to enable one of them to maintain an action at law for it, against another, to show a final settlement of the partnership concerns, and a distribution of the property to the party claiming, which, in effect, is a release of the rights of the other. *Ib.*
5. If the claim be for money, there must be a promise to pay an ascertained sum. *Ib.*
6. It is not necessary that a witness should testify to a positive promise. As in other cases, so in this, what is sufficient proof, is a question for the jury, and the fact may be established by circumstances, and just and fair inferences from facts, as well as by positive testimony. *Ib.*
7. But, in this case, where two, of three partners, are jointly suing the third, before it can be established, that he had made himself responsible to them, there should be proof of some fact going to show, that they had, *inter se*, entered into a new agreement. *Ib.*

PARTIES IN CHANCERY.

See PRINCIPAL AND SURETY, 2.

PATENTS.

See DEEDS.
EJECTMENT.

PLEADING.

1. It is a departure in pleading, where after a defendant has pleaded performance of the condition of a bond generally, and the plaintiff has replied a breach of the condition, for the defendant to rejoin the insolvency of the plaintiff, and transfer of his right of action to a trustee. *Burroughs vs. Clarke et al.*, 196.
2. Departure in pleading, may be taken advantage of by general demurrer. *Ib.*
3. Whether lands may be declared for, or recovered by their reputed name, *qr.* *Budd vs. Brooke, et al.*, 198.
4. A defendant may plead a pending attachment against the claim of the plaintiff. *Baldwin vs. Wright and Kent*, 241.
5. An attachment issued without any return of service, is not attended with the same consequences. *Ib.*
6. The account filed by a plaintiff, with a count in his declaration for sundry matters and things, properly chargeable in account, is not a bill of particulars, though it is an essential part of such count. *Carter vs. Tuck*, 248.
7. It is the office of a bill of particulars, to inform the defendant what is claimed under each count in the nar, be they many, or few. *Ib.*

PLEADING—*Continued.*

8. When the plaintiff declared upon a single bill as the assignee in writing thereof, and the defendant pleaded, that he was a minor at the period of the execution of the bill;—to which the plaintiff replied: ratification after full age;—on which replication the issue was made up; the defendant, at the trial, cannot ask an instruction to the jury, that the plaintiff is not entitled to recover, because the single bill was endorsed in blank at the time the suit was brought, and the assignment over the name of the obligee, only written at the bar, after the jury had been empanelled. *Chesley vs. Taylor*, 251.
9. The plea of limitations, to a *scire facias* to revive a judgment, ought to state the time when the judgment was rendered, otherwise it is defective on special demurrer. *Beanes vs. Hamilton*, 275.
10. The plaintiff in attachment need not file a declaration. The plea of the garnishee is to the writ of attachment, and the business of the plea is, to show why the attachment should be quashed. *Barr vs. Perry*, 314.
11. The objection, that a corporation sues by a wrong name, is matter of abatement, and cannot be taken upon the trial of the general issue. *Bank of Metropolis vs. Orme*, 443.

PLEADINGS IN EQUITY.

1. The act of limitations to be available, must either be relied on by plea or answer. *Allender et al., vs. The Vestry of Trinity Church*, 166.
2. Defensive averments in an answer, not responsive to a bill, unsupported by proof, are disregarded at the hearing. *Fitzhugh et al., vs. McPherson, adm'r of Neth*, 408.
3. Upon a decree *pro confesso*, it is an established principle, that the allegations of the bill are to be received as true, as to those parties against whom the decree passed. *Ib.*
4. Where a bill charged, that a complainant was entitled to the mortgage debt, with interest thereon, this averment authorises the recovery of the debt, with either simple or compound interest, as appears to be just upon all the circumstances of the case. *Ib.*

POSSESSION.

See COURT OF CHANCERY, 17—CONSTRUCTIVE NOTICE.

PRACTICE.

1. An agreement of facts made, and filed in a cause, prior to its first trial, which after judgment was reversed upon appeal, is competent evidence upon a second trial, under a *procedendo*. *Merchants Bank vs. Marine Bank*, 96.
2. A notice entitled in another cause to produce books in evidence, merely filed in this, without proof of service, raises no inference against the party to whom the notice is addressed. *Allender et al., vs. Vestry of Trinity Church*, 166.
3. Under the act of 1785, ch. 80, sect. 11, the courts have power to enter judgments on awards returned under that act, notwithstanding the death of either of the parties to the cause referred. *Turner vs. Maddox*, 190.

PRACTICE——*Continued.*

4. Where an objection is made to the admissibility of evidence in mass, without specification, if any part of it is admissible for the purpose for which it was offered, it is not error in the court to overrule the objection. *Budd vs. Brooke et al.*, 198.
5. Where an entire prayer is good in part, and bad in part, the court is not bound to perform the duty of counsel, analyze the subject matter of the prayer, admit a part, and reject the residue; but may content itself, in granting, or rejecting the same, according to its merits, as presented in its entirety. *Ib.*
6. If for any reason, no matter whether it be for the reason assigned or not, the testimony objected to, be inadmissible for the purpose for which it is offered, it should be rejected by the court. *Ib.*
7. The refusal of a prayer, which ought not to have been granted, though made upon erroneous constructions of the evidence, is not error in the county court. *Ib.*
8. The time of recording a deed, is sometimes a matter to be determined by the court, sometimes a question to be submitted to the finding of a jury. *Ib.*
9. When the blank is filled up, it becomes an assignment in writing by the party who endorsed it in blank; and though the assignment may not be completed until the time of trial, it is regarded, for the purposes of the suit, as having been made when the instrument was endorsed. *Chesley vs. Taylor*, 251.
10. When the plaintiff declared upon a single bill as the assignee in writing thereof, and the defendant pleaded, that he was a minor at the period of the execution of the bill;—to which the plaintiff replied: ratification after full age;—on which replication the issue was made up; the defendant, at the trial, cannot ask an instruction to the jury, that the plaintiff is not entitled to recover, because the single bill was endorsed in blank at the time the suit was brought, and the assignment over the name of the obligee, only written at the bar, after the jury had been empanelled. *Ib.*
11. Where the whole proof in a cause was oral, and the jury, in its consideration, might infer title either in the plaintiff or defendant, as they should happen to make inferences from the proof, it is error in the county court to consider the proof as establishing only one view of the cause, and instruct the jury, absolutely, upon that hypothesis. Such a course decides the matter in controversy, which could alone, from the evidence, be determined by the jury. *Isaac vs. Williams*, 278.
12. Where the right to recover, depended upon the performance of work alleged to have been done, of which proof was given, it is error in the court refusing the prayer of the defendant, that the plaintiff is not entitled to recover, to add an instruction, that the plaintiff under the proof is entitled to recover. This takes the fact from the jury. *Ramsburg et al., vs. McCahan*, 341.
12. By the act of 1791, ch. 68, an appeal is given from the judgment of a magistrate to the next county court; but such appeal shall not

PRACTICE——*Continued.*

operate as a stay of execution, or supersedeas of the judgment, unless an appeal bond be filed at the time of taking such appeal. *Brewer and Draper vs. Smith*, 299.

13. Under this act, the appeal might be taken at any time after the rendition of the judgment, provided it be taken to the county court next thereafter. *Ib.*

14. By the act of 1818, ch. 160, appeals not taken to the next county court, shall not be dismissed; unless the court shall be satisfied, that the appellant had notice of the judgment, at least ten days before the sitting of the county court. *Ib.*

15. The sole object of the act of 1825, ch. 68, was to provide a remedy, where executions on magistrate's judgments had been levied within fourteen days after their rendition; and in cases where an appeal had been taken, and appeal bond filed, within such fourteen days, it was to operate as a supersedeas of an execution levied. *Ib.*

16. The policy of the acts of 1818, ch. 160, and 1825, ch. 68, stated. *Ib.*

17. The act of 1829, ch. 236, prescribes the terms, conditions, and effect, of appeals from magistrate's judgments; and repeals, except in the city of *Baltimore*, the provisions, in relation to such appeals in the acts of 1818 and 1825, and is a substitute therefor. It was not designed to repeal any part of the act of 1791. *Ib.*

18. The 7th sec. of the act of 1831, ch. 290, is declaratory only, and does not change the construction of the act of 1829. *Ib.*

19. It is the province of the court to determine, whether evidence is legally calculated to conduct the mind of a jury to a conclusion. *Morgan vs. Bitzenberger*, 350.

20. It is the province of the jury to determine, the sufficiency or insufficiency of the evidence in fact, to prove the affirmative or negative of the issue. *Ib.*

21. Payment or non-payment of the purchase money, was, in this case, exclusively for the jury. *Ib.*

22. Where a note of the debtor was taken for a debt, and the creditor afterwards sues him upon the original contract, proof that the note was redelivered to the debtor, sufficiently accounts for its absence at the trial. *Ib.*

23. In an action of *assumpsit*, the plaintiffs proved, that they and defendant were partners; that in *April* 1841, the defendant told the witness, that two or three days before, they had dissolved partnership. In March 1841, there was a balance of cash to the credit of the firm; and in June of that year, it was drawn out by the defendant, he urging, as a reason why he drew it out, that if the plaintiffs got it, he did not know whether he could ever get any of it again; the plaintiffs further proved, that in August 1842, the defendant stated the balance of the money in bank, in March 1841, belonged to the plaintiffs, and he had drawn the sum of, &c., thereout, by check. The defendant offered no proof; HELD:

PRACTICE.—*Continued.*

1st. That a prayer by the defendant, to instruct the jury, that the evidence was not sufficient to enable the plaintiffs to recover, admitted, as proof, all the facts sworn to, and all rational inferences deducible from such facts. *Riarl vs. Wilhelm*, 356.

24. Where a variety of prayers were submitted to the court by the plaintiff and defendant, and the instruction given by the judge to the jury, covered the whole ground of controversy, the judgment will not be reversed, though some of the prayers refused, were in themselves correct. *Mutual Safety Insurance Co. vs. Cohen*, 459.

25. Upon a motion in arrest of judgment, the appellant may assign other errors than those which are to be found in the record. So upon a motion to quash an attachment. *Dickinson vs. Barnes*, 485.

26. Where process is duly returned, the party affected by it is bound to take notice of the proceeding; and in proper time, and while the process is before the court, move for any order or judgment in relation to it. *Moreland vs. Bowling*, 500.

27. Parties have a day in court, for the purpose of being heard; and failing to avail themselves of it, they must thenceforth submit to the injury or inconvenience which their own neglect has occasioned. *Ib.*

28. Where the return of a sheriff is not made to the term at which the process is returnable, but after the actual sittings of the court were over, at a day in vacation, parties objecting to it, are not bound to move until the next term. *Ib.*

29. A sheriff may retain a *fi. fa.* in his hands, after a levy, and after an ineffectual effort to sell, not only until the return day has passed, but until several terms have passed, and may then sell. *Ib.*

30. It is at the option of the plaintiff to rule a return of the *fi. fa.* and issue a *vendi. exponas;* or to allow the sheriff to continue to act under the *fi. fa.* *Ib.*

31. On a motion to set aside a sale returned under a *fi. fa.*, it is the necessary and uniform practice, to examine into all the facts by parol or other proof, and not regard technical estoppels. *Ib.*

32. The act of 1816, chap. 129, is express, that notice of a sale under a *fi. fa.*, should be set up at two or more public places in the county, besides the court house, and upon failure to give such notice, the sale will be set aside, on motion made in due time, when the writ is returned. *Ib.*

33. A defendant may plead a pending attachment against the claim of the plaintiff. *Baldwin vs. Wright and Kent*, 241.

34. An attachment issued without any return of service, is not attended with the same consequences. *Ib.*

35. The overruling a motion to quash an attachment is not the subject of an appeal. It is only interlocutory matter. *Ib.*

36. Where a judgment has been entered for the use of a party who disclaimed the assignment to him, the defendant may move the court to strike out the use, and upon proof of such disclaimer, the court may strike it out. *Ib.*

See ATTACHMENT TO COMPEL APPEARANCE.

PRACTICE IN COURT OF APPEALS, 2, 3, 5.

PRACTICE IN CHANCERY.

1. A creditor of a distributee in chancery, claiming by petition, to be paid his debt out of a fund in court to be distributed, must show himself remediless at law; or that he has some lien or title to the fund sought, which it is the duty of a court of equity to enforce. *Clagett, adm'r of Beanes, vs. Worthington, Trustee*, 83.
2. The answer of the widow and executrix of a father, who had made an advancement to his child of a *first* marriage, of which the respondent had no personal knowledge, is not within the general rule, that it can only be disproved as an answer responsive to the bill, by two witnesses, or by one witness with strong corroborating circumstances. *Dugan et al., vs. Gittings et al.*, 138.
3. An answer which does not admit the allegations in a bill, puts the complainant on proof thereof, and leaves him to sustain them as they can. *Ib.*
4. Primary proof in equity, stands in the place of full proof, until full proof is demanded. Such a demand dispenses with and invalidates primary proof. *Allender et al., vs. Vestry of Trinity Church*, 166.
5. A defendant may plead a pending attachment against the claim of the plaintiff. *Baldwin vs. Wright and Kent*, 241.
6. An attachment issued without any return of service, is not attended with the same consequences. *Ib.*
7. The overruling a motion to quash an attachment is not the subject of an appeal. It is only interlocutory matter. *Ib.*
8. Where a judgment has been entered for the use of a party who disclaimed the assignment to him, the defendant may move the court to strike out the use, and upon proof of such disclaimer, the court may strike it out. *Ib.*
9. Where a bill was dismissed, not upon its merits, but under a rule further to proceed in the cause, it is not necessary to qualify the order of dismissal, by saying it shall be without prejudice to the rights of the complainants. *Cross et al., vs. Cohen*, 257.
10. The act of 1832, ch. 302, sec. 5, provides, that no point relating to the competency of witnesses, or admissibility of evidence, shall be raised in the appellate court, unless it shall plainly appear by the record, that such point had been raised *by exceptions* filed in the cause in the chancery court. *Ib.*
11. The incompetency of a witness is not now noticed, unless objected to by exceptions. *Ib.*
12. It is an universal practice in chancery, that exceptions, like other formal papers, filed in a cause, must be signed by a solicitor of the court. *Ib.*
13. The return by an officer, before whom depositions are taken, by consent or by order of court, that objections were furnished to him to be filed, and filed in a cause, is not filing exceptions in the court of chancery, in compliance with the act of 1832, ch. 302. *Ib.*
14. The reservation of all legal exceptions usually inserted in an order of the court of chancery, permitting evidence to be taken in a cause,

PRACTICE IN CHANCERY—*Continued.*

does not, since the act of 1832, ch. 302, authorise the Chancellor to make objections at the hearing, to the competency of a witness. That was formerly the practice of the court, but the act was passed to prevent it. *Ib.*

15. Upon a bill filed by husband and wife, against the co-heirs of the wife, to procure the division or sale of their father's real estate, of which he died seized and intestate, the fact, that one of the co-heirs, defendants, had purchased the wife's interest from her husband, and also the interest of the other heirs, no conveyance having been procured from the wife, in the mode prescribed by law, to pass the real estate of the *feme covert*, will not prevent the county court from issuing a commission, and directing and allowing an election to be made by the parties entitled, according to the act regulating descents. *Chaney et ux., vs. Tipton et ux.*, 327.

16. After an election is made, and the bonds for the purchase money are about to be given; or if the election shall be refused, when the proceeds of sale are about to be distributed, the court will take into consideration the rights of the purchaser, and adjust the details of the transaction accordingly. *Ib.*

17. Defensive averments in an answer, not responsive to a bill, unsupported by proof, are disregarded at the hearing. *Fitzhugh et al., vs. McPherson, adm'r of Neth*, 408.

18. Upon a decree *pro confesso*, it is an established principle, that the allegations of the bill are to be received as true, as to those parties against whom the decree passed. *Ib.*

See PRACTICE IN COURT OF APPEALS, 7.

PRACTICE IN COURT OF APPEALS.

1. When a party offered to read a commission to take testimony and the proceedings under it, to the jury, and his opponent objected to all such parts of it as went to establish a particular fact; and the county court permitted all of the depositions to be read, to which the defendant excepted, this court will not consider that tribunal as deciding any other question than the specific one raised. *Bullit vs. Musgrave*, 31,

2. It was the duty of the county court, as no other objection was taken than the one above adverted to, to permit the residue of the evidence to be read to the jury. *Ib.*

3. It is not the duty of the court to point out objections to the admissibility of proof. *Ib.*

4. Since the act of 1825, ch. 117, no point can be insisted upon, by the appellant, which was not raised by the court below; and this court cannot act on a question which shall not appear to have been presented to the county court. *Ib.*

5. It is a fatal objection to a prayer, that facts are assumed in it which should be submitted to the jury. *Ib.*

6. All questions necessarily raised by a prayer in the county court, we must presume were brought to the attention of that tribunal. *Ib.*

PRACTICE IN COURT OF APPEALS—*Continued.*

7. Where the court determined that a contract ought to be rescinded, in a case where there was no legal evidence to show the possession of the vendee or its duration, or whether the deterioration of the property proceeded from casualty or negligence, nor of the value of the rents and profits, they neither reversed nor affirmed the decree of the chancellor, but remanded the cause under the act of 1832, ch. 302, that evidence might be taken on those subjects. ***Buchanan et al., vs. Lorman et al.*, 51.**
8. Under the act of 1830, ch. 185, sec. 1, orders or decrees passed in an equity case, previous to the final decree, are open for revision in the appellate court by force of the very words of that act. ***Dugan et al., vs. Gittings et al.***, 138.
9. The act of 1841, ch. 11, repeals that branch of the 1st sec. of the act of 1830, ch. 185, which denies to a party the privilege of appealing from any decree which was not final in its character, and restored to him the right of an immediate appeal from the *particular decrees enumerated* in that section; yet it leaves in force the other branch of that section, as to the effect of an appeal from a final decree when taken. *Ib.*
10. The act of 1841, ch. 11, did not contemplate a total repeal of the act of 1830, ch. 185. It repealed only that portion of the latter act which had abridged the right of appeal. *Ib.*
11. Where an executrix alleges in her answer that she has received the assets of her testator, as shown by her return to the *Orphans* court, which she is prepared, when required, to produce, this is not an admission of the sufficiency of assets; and as the complainants failed to prove such sufficiency, this is a failure on their part to establish, by proof, a material allegation in their bill. The appellants, the defendants in equity, are not precluded by the act of 1832, ch. 302, from raising that question in this court; and under that act the cause is therefore remanded. *Ib.*
12. The overruling a motion to quash an attachment is not the subject of an appeal. It is only interlocutory matter. ***Baldwin vs. Wright and Kent*, 241.**
13. The decision of the county court, permitting the garnishee in an attachment cause, to file pleas in bar, and to the merits, is not the subject matter of an appeal. ***Barr vs. Perry*, 313.**
14. Where an action was brought on the administration bond of *L B's* estate, for the use of *J*, and in the progress of the cause, the plaintiff asked leave to strike out the use, and enter the cause, for the use of the *administrator de bonis non* of *L B*, who proposed to claim an unadministered balance of money in the hands of the first administrators, and tendered a replication to that effect; the county court overruled the motion, from which the plaintiff entered an appeal on the record. After this, the plaintiff being called to join in demurrer with the defendant, made default, and a *non suit* was entered against him. HELD, that an appeal did not lie. ***State, use of Boone, vs. Bryan, Exc'r of Burch*, 388.**

PRACTICE IN COURT OF APPEALS—*Continued.*

15. Upon an application by petition to the county court to open a road, a commission was ordered, and the court adjudged the road to be opened. HELD, that an appeal did not lie from that decision. *Savage Man. Co. vs. Owings*, 497.
16. Unless by express provision of some act of Assembly, an appeal will not lie in any case in which a writ of error would not lie. *Ib.*
17. A writ of error will not lie to a court vested with special jurisdiction, and which does not proceed according to the forms of the common law. *Ib.*

PRESUMPTION OF LAW AND FACT.

1. The court will not direct the jury to presume conveyances to a party or his heirs, where the proof of possession, on which the presumption is founded, is not clear and sufficient, both as to the character of the possession, and its duration. *Budd vs. Brooke et al.*, 198.
2. It cannot be assumed from the neglect or failure of a sheriff to return an attachment, that there has been no service of it, and unless such fact was made to appear to the court, it would not be justified in issuing a second attachment. *Baldwin vs. Wright and Kent*, 241.

See EVIDENCE, 11, 12.

PRIMARY PROOF.

See EVIDENCE, 9.

PRINCIPAL AND AGENT.

1. If the cashier of a bank promise to pay a debt which the corporation did not owe, or was not liable to pay, or should admit forged bills to be genuine, such promise or admission would not bind the bank, unless it had authorised or adopted the act. *Marine Bank vs. Merchants Bank*, 96.

See ATTORNEY AT LAW.

PRINCIPAL AND SURETY.

1. A party who seeks to recover in equity against one of the several sureties, in a trustee's bond, the whole amount of his claim against a defaulting trustee, must not only prove the insolvency of the principal in the bond, but of all the other co-securities. *Clagett, adm'r of Beanes, vs. Worthington, Trustee*, 83.
2. The co-securities, or their representatives, should be parties to such a proceeding. *Ib.*
3. The fact that a surety in a trustee's bond, is also a distributee of the fund in his hands, will not authorize another distributee to require a court of equity to apply the portion of the fund due to the first distributee, in discharge of his obligation as surety, where the trustee is in default. The remedy for non-performance is at law. *Ib.*

RECEIPT.

See EVIDENCE, 23.

RECISSION OF CONTRACTS.

See COURT OF CHANCERY, 4.—Sub-division, 5, 6, and 11.

REGISTRATION OF DEEDS.
See DEEDS.

REMAINDER—VESTED AND CONTINGENT.
See WILL AND TESTAMENT, 7 to 15,—18 to 21.

RENTS AND PROFITS.
See COURT OF CHANCERY, 10.
LIMITATION OF ACTIONS, 2, *sec.* 6, 7.

REVENUE OF THE STATE.
See CONSTITUTIONAL LAW, 1.
STAMPS.

ROADS.
See JURISDICTION, 3.

RULE IN SHELLY'S CASE.
See WILL AND TESTAMENT, 5.

SHERIFF.
See EXECUTION.

SHIPS AND SHIPPING.
1. The objects intended to be secured by the act of Congress of 18th February 1793, for enrolling and licensing ships and vessels were, by excluding foreign vessels from a participation in the commerce which existed between the States, to cherish and promote the growth of our own marine, and guard, as far as possible, the revenue from the frauds and abuses to which it would be otherwise exposed. *Howell vs. The State*, 14.
2. The *American* ownership of a vessel and her national character is ascertained, not by her license, but by her enrolment. It shows that the regular proof of ownership and character has been given. *Ib.*
3. The license authorises the owner of the vessel to carry on the coasting trade, and navigate the waters of the *United States*. *Ib.*
4. There is no incompatibility between the law taxing the interest in a vessel, and the license authorising it to carry on the coasting trade, The tax does not interfere with the right to navigate. *Ib.*

SLAVES.
See EVIDENCE, 19, 20—Gift of.

SMALL DEBTS.
See PRACTICE, 12 to 18.

SOLICITOR IN CHANCERY.
See ATTORNEY AT LAW.

SPECIAL JURISDICTION.
See EVIDENCE, 24.
JURISDICTION AND JUDGMENT.

STAMPS.
1. Under the act of 1844, ch. 280, the bonds of trustees, executors, and administrators, conditioned for the faithful performance of their official duties, are not required to be stamped. *Burton, et al., vs. The State*, 1.

STAMPS—*Continued.*

2. Neither is a check of a bank in this State, upon a bank in another State, at sight, or otherwise, nor a certificate of deposite given by a bank. *Ib.*
3. The terms, "bonds and obligations" in that act, are to be confined to such as are given for the payment of money. *Ib.*
4. The banks of this State are secured in the privilege of issuing checks, bills of exchange, and certificates of deposite. *Ib.*
5. The original charters of the "*old banks*," as they are termed, will expire on the 10th March 1846. *Ib.*
6. Under the act of 1844, ch. 280, a mortgage, without a covenant to pay the debt secured; a lease on which is reserved a rent in money, or in specifics; an assignment of property, in consideration of an annuity, to be paid by the grantee for the life of the grantor; an order or draft not sold, nor intended to be put into circulation, but made solely to obtain possession by the party of his own funds, are not required to be stamped. *Ib.*
7. A mortgage with a covenant, to pay the debt secured; a due bill, or written acknowledgment of indebtedness to a certain extent; an account stated, signed by the parties, or by the party to be charged, as evidence of debt, are required to be stamped. *Ib.*

STATUTE OF FRAUDS.

1. Performance of the consideration, and change of possession under the contract, are the two ingredients, which when combined, have always been regarded as relieving a parol agreement from the operation of the statute of frauds. *Dugan et al., vs. Gittings et al.*, 138.
2. *B* sold *M* a parcel of land, executed a deed of bargain and sale therefor, and put him in possession. The deed contained a receipt for the purchase money. The proof showed, that *M*, at time of sale, paid part of purchase money. Shortly after, paid another part, and gave his promissory note for the balance; before the note fell due, the vendee took up the note, by his own order on *F*, for the like sum. This order *F* refused to pay, and upon the fact of the refusal being communicated to *M*, he asked *B* to hold on to the order, that *F* must pay it. In an action of *assumpsit*, to recover the unpaid part of the purchase money; HELD: That the claim was not within the statute of frauds. *Morgan vs. Bitzenberger*, 350.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

SUPERSEDEAS.

See PRACTICE, 12, 15.

SUPREME COURT U. S.

1. The decisions of the Supreme Court of the *United States* on constitutional questions are conclusive. *Howell vs. The State*, 14.

TAXES.

1. By the act of the extra session of 1841, ch. 23, the interest or proportion in all ships or other vessels, whether in port or out of port,

TAXES—*Continued.*

owned by persons resident of the State, are directed to be valued, as other property is directed, and charged according to such valuation with the public assessment of twenty cents in every hundred dollars of assessed value. HELD: that the tax was a constitutional and valid exercise of power by the State. *Howell vs. The State*, 14.

2. The right to tax is an incident of sovereignty, and is co-extensive with that to which it is incident. All subjects over which the sovereign power of the State extends, are objects of taxation, but those over which it does not extend, are upon the soundest principles exempt from taxation. *Ib.*
3. The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but it does not extend to those means which are employed by Congress, to carry into execution powers conferred on that body by the people of the *United States*. *Ib.*
4. Property in ships and vessels was, before the adoption of the constitution of the *United States*, embraced by the taxing power of the State. *Ib.*
5. The power of taxation extends to all the people of the government, and embraces every thing which may be fairly considered as constituting a part of the mass of property within the State. *Ib.*
6. The interest in ships and vessels is private property, and belonging to a citizen of *Maryland*, living within her territory, subject to her jurisdiction, protected by her laws, is a part of his capital in trade; and like other property the subject of State taxation. *Ib.*
7. Taxes levied for the city of *Baltimore*, on real estate, prior to 1840, ch. 63, are not liens on the land, where there is a sufficiency of personal property on the premises taxed, to pay the same. *Dallam et al., vs. Oliver's Exc'rs*, 445.
8. The act of 1840, chap. 163, which authorised the city of *Baltimore* to provide, by ordinance, for the prompt collection of taxes due the city, and to that end, may and shall have power to sell real, as well as personal property, will not be so construed, as to have a retrospective effect. *Ib.*

See STAMPS.

TENANT BY THE CURTESY.

1. The husband is tenant by the curtesy of the equitable inheritance of his wife. *Dugan et al., vs. Gittings et al.*, 138.

TIME.

See COVENANT, 1.

TRESPASS.

See EVIDENCE, 1.

TRUSTS—TRUSTEE.

1. A sum of money deposited in the Court of chancery, being detained there by appeal, it was, in July 1836, agreed, that by and with the consent of the Chancellor, that *G* and *S* be constituted trustees, to

receive and invest such funds; and that upon the final hearing of the appeal, the trustees should pay into the Court of chancery the said sum, and all interest and profit which might accrue thereon, subject to the order and decree which might be passed on said appeal. The money was paid to the trustees, who jointly receipted therefor, loaned *H* a part thereof, which was repaid in about twelve months, and immediately thereafter loaned the same sum to *T*, who amply secured the same by mortgage. The mortgagee paid interest thereon from time to time to *S*, *one* of the trustees; and in 1841, repaid him the entire principal sum, when he released the mortgage. All the payments to *S*, were *without* the knowledge, privity, or consent of *G*, who was also ignorant of the release. The cause, upon appeal, was decided in 1838, but no application was made for a distribution of the fund, by those entitled to it by the decree of the Chancellor and appellate court, until 1843, when a petition was filed, requiring the trustees to account. It then appeared that *S* had misapplied the fund received from *T*. There was no charge of fraud, collusion, or criminal remissness on the part of *G*. HELD: that the loan to *T*, was properly and regularly made, and that *G*, as co-trustee, was not responsible for the money received by *S* from *T*, and misapplied. *Glenn vs. McKim*, 366.

2. A trustee is answerable for the default of his co-trustee, if, with a knowledge, that the trust fund is in a course of abuse, that his co-trustee is making an improper use of it, he remains passive, refuses or declines to interfere. *Ib.*

3. If there be mal-practice, fraud, or evil dealing between co-trustees, then the one shall be answerable for the default of the other. *Ib.*

4. If judicial trustees are to be made responsible for the acts of each other, in cases where trustees, by agreement, would not be so, it must be by virtue of a bond, taken for the due performance of their trusts, and where one stipulates for the other. *Ib.*

5. Where there are two trustees, and one of them is in default, without the knowledge, privity, or consent of the other, the parties interested, who selected the defaulting trustee, shall not hold the other, innocent one, liable for the defaulter's acts. *Ib.*

6. Where two trustees are appointed to receive and invest money, and one of them puts it into the hands of the other to invest, instead of investing it with his associate, and the latter uses the money, both are answerable. *Ib.*

7. Where money was paid out of chancery, by agreement, to trustees, to invest and make interest pending an appeal, and the trustees, upon the determination of the appeal, were to bring the fund and interest again into court, but, in the meanwhile, other proceedings were had in the cause, which prevented the Chancellor from awarding a distribution of the fund, until these also were disposed of, the obvious intent of the parties required, that the investment, for the sake of interest, should continue until such other proceedings were acted

TRUSTS—TRUSTEE—*Continued.*

upon, and it was not the duty, nor the right of the trustees, to prevent the fund from yielding interest, while the court had not, from any cause, the power of distributing it. *Ib.*

8. Upon a creditor's bill, for the payment of a mortgage and other debts, the land of a deceased debtor, was decreed to be sold by a trustee appointed for that object. The trustee made and reported a sale. The funds raised in that mode being insufficient, a contribution was directed to be levied upon the devisees of the debtor, at their request, for the balances due certain specified creditors, which was done, and the accounts stated, both with the trustee and devisees, confirmed. After this, some of the devisees paid their contributions to the trustee, who wasted that part of the funds, and died insolvent. A second trustee was appointed, who collected the balance of the contributions. HELD :—

1st. That this last balance, was to be distributed rateably among the specified creditors in the contribution account.

2nd. That the first trustee had no authority, either under the original decree, or the ratified accounts, to receive the same.

3rd. That the claim of the complainant, who obtained the decree, was not affected by such payment to the trustee, although the trustee was his solicitor. Neither was that of a mortgagee of the land decreed to be sold, though it included that belonging to the contributing devisees. *Farmers Bank of Maryland vs. Mackall and Tilton*, 447.

9. The relation of a solicitor to the complainant in the cause, where the former is appointed a trustee, to make a sale by decree, becomes dormant when the decree is obtained. The solicitor, when he was appointed trustee, assumed a new character. Unauthorised receipts of money by the trustee, will not be sanctioned in virtue of any supposed relation of client and attorney. *Ib.*

See COURT OF CHANCERY, 21 to 30.
WILL AND TESTAMENT, 4.

USURY.

See COURT OF CHANCERY, 39.

VENDITIONI EXPONAS.

See EXECUTION.

VENDOR AND VENDEE.

1. Under the act to direct descents, the alienee of an heir, in the cases therein provided for, is authorized to stand in the place of his vendor, as to the right of election or distribution. *Chaney et ux., vs. Tipton et ux.*, 327.

2. If his interest or claim be such as a court of equity will specifically enforce, the remedy must be sought by the proper process of the Chancery court: for any other contract in relation to land, the ordinary remedies at law, or in equity, as the case may require, will be open to the party entitled. *Ib.*

See COURT OF CHANCERY, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.
E. S. BUCHANAN, ET AL., vs. A. LORMAN, ET AL., 51, 52.

VESTRIES.

See CHURCH PROPERTY.

VOID.

See ARBITRATION AND AWARD, 6.
WILL AND TESTAMENT, 18 to 21.

WAIVER.

See COURT OF CHANCERY, 30.

WILL AND TESTAMENT.

1. *B* devised to *M:* "my dwelling, and all the grounds, land, &c., attached thereto, to hold during the life of my brother *C*, for the use of my said brother during his natural life; and after his death, I devise the same to *M*, to hold in trust for the use of *P*, the grandson of my brother *C;* and in case the said *P should have issue of his body, lawfully begotten*, then I will and devise the same to *P* in fee; but in the *event of his dying without such issue*, I will that the same be sold by my executor, and the proceeds thereof, I devise as follows: *one-half* thereof to my nephew, *H*, and the *other half* to *M*, to hold during the life of my sister, in trust for her sole use; and at her death, the principal to be equally divided among her children." The testator also devised to *M*, in trust for the use of *P*, one-fourth part of the proceeds of the residue of his property, *real, personal* and *mixed*, directed by his will to be sold; and also one-fourth part of his debts, requesting the trustee, *M*, to invest the same, and apply the interest thereof to the use of *P*, and in case he should *have issue of his body, lawfully begotten*, then the investments to be made over to *P;* and in *the event of his dying without issue of his body, lawfully begotten*, then one-third part thereof to *H;* one-third part to *C;* and one-third part to *M*, in trust for his sister, as before. HELD;
2. The intention of the testator is apparent, that the one-third part of the debts and residue of his estate, devised in trust for his sister, should vest in his trustee, at the same time and upon the same contingencies with the moiety of the proceeds of sale of the real estate, mentioned in the first clause above recited. *Clagett, adm'r of Beanes, vs. Magruder, Trustee*, 83.
3. The correct interpretation of the bequest, in relation to the debts and residue, depends upon the true construction of the devise of the real estate. *Ib.*
4. A trust estate for life is in the first instance given to *P*. *Ib.*
5. There is no limitation over of the property devised, (conceding that the life estate had been unincumbered by the trust,) to the heirs, or issue of the body of *P*, so as to let in the operation of the rule in *Shelly's* case. *Ib.*
6. The limitation over, after the trust estate to *P*, for life, is to himself in the event of his having issue. *Ib.*
7. The limitations over to *H*, and the sister of the testator, were not made dependent upon *P's* fee, or to take effect upon its termination, by the happening of a contingency provided by the testator, for its duration. *Ib.*

WILL AND TESTAMENT—*Continued.*

8. The vesting of the fee in *P*, by his having children, put an end to the limitation over, to *H* and the sister of the testator, and left the estate of *P* absolute. *Ib.*
9. The limitation over in their favor was not intended to follow the fee, and to vest and be enjoyed only after its investiture, and contingent determination, but was intended as a substitute for the fee, in case of its never coming into being, according to the contingency provided for its creation. *Ib.*
10. The limitation in fee to *P*, cannot operate as a vested remainder, as its coming into existence, or vesting, depends on a contingency which may never happen, to wit, his having lawful issue. *Ib.*
11. It is good as a contingent remainder, because of the previously given particular estate for life, on which it depends, and which supports it. The happening of the contingency terminates the life estate in *P*, and creates a fee in its stead. *Ib.*
12. The non-occurrence of the contingency, and natural termination of the particular estate for life, by the death of *P*, gives effect to the substituted contingent remainder in fee, in favor of *H*, and the sister of the testator. *Ib.*
13. The vesting of the contingent remainder in fee to *P*, depending on the contingent termination of his life estate, by his *having* issue; whilst the substituted contingent remainder, in favor of *H* and the sister, can only take effect, or vest by the death of *P*, *without* having had lawful issue. *Ib.*
14. This kind of alternative limitation is termed, a contingency with a double aspect. *Ib.*
15. Where a testator intended that certain limitations over, both as to the realty and personalty, should take effect at the same time, and upon the same contingencies, this court having said, that *the failure of issue*, as to the realty, meant *without ever having had issue*, cannot hesitate to give the same construction to the same words in the limitation over, as to the personalty. *Ib.*
16. An exemplified copy of a will, made in another State, admitted to *probat* there, and certified from the records of such State, devising lands in *Maryland*, is not evidence of title in the devisee here. *Budd vs. Brooke, et al.*, 198.
17. Of wills of land in *Maryland*, our own courts only, are authorised to take *probat*. *Ib.*
18. A testator devised to his son *D*, his heirs and assigns, forever, provided he shall attain the age of twenty-one years, or die leaving issue; but in case my son shall die without issue, or before he arrives at the age of twenty-one, then I give and devise to my daughters, for life, or until their marriage, &c. *D* lived to be twenty-one years of age, and died intestate, and without issue. HELD, that by his arrival at the age of twenty-one years, the property devised to him, became a vested estate. *Watkins and wife, vs. Sears et al.*, 492.
19. That the word *or*, in the second clause of the devise, is to be construed copulatively, *and;* and that, thereby, the condition on which the lim-

WILL AND TESTAMENT—*Continued.*

itation over to the daughters was made to depend, became a condition of definite failure of issue. *Ib.*

20. In this State, a limitation over of land to devisee, for life, after an indefinite failure of issue of a prior devisee, does not convert the indefinite, into a definite failure of issue. *Ib.*

21. Where there was devise of an estate in fee, with a limitation over, after a dying without issue, it was formerly converted into an estate tail, and the limitations over, operated by way of remainder. The act of descents now converts that estate tail, into an estate in fee. *Ib.*

See BOND, 4.

WITNESS.

See EVIDENCE.

WRIT OF ERROR.

See PRACTICE IN COURT OF APPEALS.

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